PETIT
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No. 97-674 OCT 16 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOAN CAROL LIPIN,

Petitioner,

—v.—

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, JESSE D. WOLFF, JAMES T. BYRNE, JR., CARL DESCH and BARBARA E. FLETCHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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389 PP

QUESTIONS PRESENTED

1. Did the Second Circuit err in holding that the state court's penalty dismissal of petitioner's sexual harassment and related claims, for state law procedural reasons unrelated to the merits, precluded the prosecution of her federal lawsuits?

2. Did the Second Circuit err in ignoring the "exquisitely difficult" problems to which the penalty dismissal of petitioner's state action gave rise by affirming the dismissal of petitioner's two separate federal actions merely on the basis of a motion to dismiss that failed to address the disputed fact issues concerning petitioner's claim that her due process, equal protection and civil rights had been violated?

3. Did the Second Circuit err in affirming a district court decision that embodied the application of state law, and not federal, regarding privilege and confidentiality claims upon which the dismissal of petitioner's state action hinged?

4. Did the decisions below constitute an abdication of the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them by allowing a retroactive state court order to interfere with and preclude the litigation of cases properly before the federal courts?

LIST OF PARTIES
TO PROCEEDINGS BELOW

JOAN CAROL LIPIN,

Petitioner,

v.

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER and JESSE D. WOLFF,

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JOAN CAROL LIPIN,

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v.

AMERICAN RED CROSS IN GREATER NEW YORK, AMERICAN NATIONAL RED CROSS, ROBERT M. BENDER, JR., JAMES T. BYRNE, JR., CARL DESCH, and BARBARA E. FLETCHER,

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No. 97-____

In the Supreme Court of the United States

October Term, 1997

JOAN CAROL LIPIN,

Petitioner,

v.

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, JESSE D. WOLFF, JAMES T. BYRNE, JR., CARL DESCH, and BARBARA E. FLETCHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joan Carol Lipin respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit filed on December 12, 1996, as "corrected" by a Summary Order filed on May 22, 1997, and the denial of a petition for rehearing by an Order dated July 18, 1997. (51a)[1]

[1] Citations followed by the suffix "a" refer to the Appendix annexed hereto. Citations preceded by the prefix "JA" refer to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit dated December 12, 1996, which was barred from publication as precedential authority, is in the Appendix at pages 19a to 27a.

The "corrected" Summary Order of the United States Court of Appeals for the Second Circuit dated May 22, 1997, also barred from publication, affirms dismissal of the complaints in the two separate cases filed in the United States District Court for the Southern District of New York, but on different grounds than in the Second Circuit's first Summary Order, namely, based on claim preclusion instead of issue preclusion, is in the Appendix at pages 1a to 18a.

The petition for rehearing was denied by an Order filed July 18, 1997. (51a) The mandate was issued July 25, 1997. (53a) The District Court Opinion and judgment dismissing the two federal actions are reproduced in the Appendix at 33a and reported at 1996 U.S. Dist. LEXIS 396 (S.D.N.Y. 1996).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition is timely pursuant to Supreme Court Rule 13 ¶ 3 as the Second Circuit's Order denying the petition for rehearing was filed on July 18, 1997. The mandate, which also is referred to as a judgment on the Second Circuit's docket sheet, is dated July 25, 1997. (55a)

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1738; 36 U.S.C. §2; the Civil Rights Enforcement Statutes, 42 U.S.C. §§ 1981, 1983, 1985(2) & (3), 1986; the New York Judiciary Law § 487;

New York Civil Practice Law and Rules §§ 205 and 3103; and New York Civil Practice Law and Rules 5013.

The statutory provisions are quoted in the Appendix at pages 362a to 374a.

STATEMENT OF THE CASE

A. Introduction

This case involves the effect of the penalty dismissal of a state sexual harassment case on state procedural grounds, for reasons having nothing to do with the merits of the claims pleaded, on two subsequently filed federal actions.

A leading commentator has observed that, in subsequent federal litigation:

> "[The problems of how to treat] penalty dismissals seem exquisitely difficult."

18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4467, pp. 643-44 (1981).

The courts below held that the penalty dismissal of the New York state case barred the litigation of the two separate subsequent federal actions under the doctrine of "claim preclusion."

Despite the "exquisite difficulty" of the problem of how to treat a penalty dismissal in such federal cases, the Second Circuit brushed off the matter in two inconsistent, publication-barred summary orders, in a shocking departure from the standard of judicial review required for proper performance of the appellate function.

The first summary order was premised on the doctrine of issue preclusion; the second summary order was inconsistently based on the doctrine of claim preclusion.

The superficial treatment that the subject received in the courts below violated the settled principle of Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982), and Allen v. McCurry, 449 U.S. 90 (1980). Those cases hold that the federal courts must take care to insure that the party against whom an earlier state court decision is asserted to be preclusive had received a full and fair opportunity to litigate the claim held to be precluded. They also hold that the federal courts have a duty to decide cases in which the state court was unable or unwilling to protect federal rights, or provide due process to the party affected. Allen v. McCurry, 449 U.S. at 100-101.

B. Procedural Background

Dismissed below under the doctrine of claim preclusion were two separate cases filed by petitioner against the American National Red Cross ("Red Cross") and a number of individual defendants in the United States District Court for the Southern District of New York.

The dismissal was the outgrowth of the penalty dismissal of a state court sexual harassment complaint under state procedural law. The sanction imposed related to petitioner's discovery of certain documents that she found in front of her in pretrial proceedings in the state courthouse and did not involve the merits of her dismissed claim for sexual harassment.

The imposition of the penalty dismissal was decided as a matter of first impression under New York Civil Procedural law. Lipin v. Bender, 193 A.D.2d 424, 425, 597 N.Y.S.2d 340 (1st Dep't 1993). (314a) The decision of the New York Court

of Appeals (322a), is published as Lipin v. Bender, 84 N.Y.2d 562, 620 N.Y.S.2d 744, 644 N.E.2d 1300 (1994).

The punitive dismissal of petitioner's New York complaint was under a state procedural rule which it was acknowledged had never previously been so applied. (322a)

As discussed below, the result would have been different under federal law because, unlike New York law, the federal rule is that the survival of the claim of privilege is dependent upon the taking of sufficient precautions to maintain confidentiality, and it is not disputed that the documents had been in plain view unsealed and open, placed in front of where petitioner sat.

The complaint in the first federal action (JA 2213-2299), which was filed following dismissal of the New York case, alleges that the documents themselves include evidence indicative of a conspiracy to violate petitioner's equal protection and other rights under 42 U.S.C. § 1986. (97-109a; JA 2268-2269)

The second federal action includes a number of other claims not pleaded in the New York case, and also involves a number of different defendants. (57a-92a)

Petitioner's assertion that defendants' motion to dismiss should have been treated as a motion for summary judgment, based upon affidavits giving rise to disputed fact issues, was rejected by the District Court. (28a)

The Second Circuit's first Summary Order, unlike the District Court's decision, was based upon issue preclusion rather than claim preclusion. (19a)

After the Second Circuit's attention was brought to the fact that the opposite result should have been reached under the doctrine of issue preclusion, the Second Circuit backtracked and issued a "corrected" Summary Order, in which claim preclusion was adopted as the basis for its decision. The showing in petitioner's petition for rehearing that the applicable claim preclusion authorities also required the opposite result was ignored. (1a)

Presented in the appendix for review by this Court are the two Summary Orders of the Second Circuit (1-27a), the District Court's decision (28a), the complaint in the second federal action (57a-92a), petitioner's affidavits showing disputed fact issues (93a; 114a; 119a; 155a; 175a; 208a; 246a; 274a; 280a; 287a), the decisions and orders of the New York court (305-314a; 315a; 322a; 334a), and the complaint filed in the New York action. (344a)

The complaint in the first federal action is not reproduced because it was sealed by the District Judge without having been read on July 7, 1992 (125-127a; 157a; 208-209a), over petitioner's opposition (155-174a; 208-220a), but we are informed that this Court may send for the complaint in the record below, as we suggest, as needed in order to compare the significant differences between the counts pleaded therein and the claims that are set forth in petitioner's state action.

The disparities involving the claims in the second action filed by petitioner are summarized in petitioner's affidavit. (19-154a; 183-202a)

REASONS FOR GRANTING THE PETITION

I. THE "EXQUISITELY DIFFICULT" ISSUES RAISED THAT INVOLVE THE GIVING OF PRECLUSIVE EFFECT OF THE PENALTY DISMISSAL OF A STATE SEXUAL HARASSMENT COMPLAINT, FOR REASONS UNRELATED TO THE MERITS, TO TWO SUBSEQUENT FEDERAL ACTIONS THAT INCLUDE CONSTITUTIONAL AND OTHER CLAIMS THAT WERE NOT AND COULD NOT HAVE BEEN PLEADED IN THE STATE ACTION, WARRANT REVIEW BY THIS COURT

The dismissal sanction was imposed as a penalty under New York procedure for reasons unrelated to the merits of petitioner's claim of quid pro quo sexual harassment perpetrated by her supervisor, Bender, the Chief Executive Officer of the New York Red Cross. (63-66a; 68a; 187a)

Whether such a state court decision has a preclusive effect on litigation in federal courts warrants review by this Court as a matter of first impression.

As stated in Luneburg, The Opportunity to be Heard and the Doctrine of Preclusion: Federal Limits on State Law, 31 Vill. L. Rev. 81, 180-181 (1986):

> "The notion of full and fair opportunity to be heard limits the preclusive effects of both state and federal judgments based upon constitutional and nonconstitutional premises. To date the Supreme Court has not clearly distinguished the due process requirements for a valid judgment and the perhaps more

> demanding constitutional requirements for issue preclusion. Nor has it directly explored to any degree the extent to which and the circumstances under which federal nonconstitutional common law limits the intrastate effect of state judgments. The potential scope of the federal exception to merger illustrated by the plurality opinion in Thomas remains unclear. It is hoped that the Supreme Court will, over the next few years, aggressively under-take to clarify the law in these areas." (Emphasis added; footnotes omitted.)

The disregard of the disputed fact issues involving the infringement of petitioner's due process rights, as shown in petitioner's affidavits, and the District Court's refusal to convert defendants' Rule 12(b)(6) motions into motions for summary judgment, as required by Fed.R.Civ.P. 12(b) (last sentence), also violated the summary judgment procedure mandated by Fed.R.Civ.P. 56. (93-118a)

The essence of the incident leading to the sanction of dismissal is that petitioner found copies of certain documents, unsealed and openly displayed in a stack before her, at the location at which she customarily sat in connection with pretrial proceedings in New York County Supreme Court on Friday, June 28, 1991. (94-105a; 221a-231a)

On the record before the District Court, the evidence of reckless conduct, at a minimum, on the part of defendants' attorneys in their handling of the supposedly confidential documents was shown in the allegations of the verified complaint of the first federal action and petitioner's affidavits. (98-109a; 220-245a; 287-304a)

Under the "plain view" doctrine, evidence that is "in plain view" is regarded as having lost its confidentiality, see Illinois v. Andreas, 463 U.S. 765, 771 (1983); Texas v. Brown, 460 U.S. 730, 740 (1983).

By a parity of reasoning, any expectation of confidentiality regarding the documents was lost after they were placed "in plain view" of petitioner in a public location, at a location in front of which it was known that petitioner would be sitting, by experienced attorneys presumptively well aware that under the "plain view" doctrine.

The lack of an essential ingredient of due process in connection with the dismissal decision of the state court is shown by the following observation of the New York Appellate Division following the dismissal of petitioner's complaint (316a):

> "It is unclear why and by whom the documents where placed in that precise location and not otherwise safeguarded. . . ." (Emphasis added.)

To penalize an unsuspecting plaintiff not knowledgeable about or trained in the intricacies of the attorney work-product privilege, or consequences of a procedural matter of "first impression" under New York law, resulting in the dismissal of her claims for sexual harassment, but at the same time allowing the skilled lawyers representing the supervisor who had made her life a living hell by continually sexually harassing her in her place of employment, as alleged in the complaint, to escape from responsibility for the situation involving the documents that their own reckless conduct created is violative of the "elementary notions of fairness enshrined in our constitutional jurisprudence." BMW of N. Am. v. Gore, __ U.S. __, 116 S. Ct. 1589, 1598 (1996).

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Such is particularly so since the Red Cross is a federal instrumentality that may be sued under federal law under 36 U.S.C. § 2, see American Nat'l Red Cross v. S.G. and A.E., 505 U.S. 247 (1992), and also is subject to suit under 42 U.S.C. § 1983, as well as under 42 U.S.C. §§ 1981, 1985, and 1986.

The Second Circuit's decision is contrary to the principle established by McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 360 (1995). Under it, misconduct by a party litigant with respect to confidential documents, even when premeditated, as in McKennon, unlike the situation here involved (as noted in Lipin v. Bender, supra, 193 A.D.2d at 427), does not immunize the employer from liability, and brings to the fore the question of whether the excessiveness of such punitive action by a state court can withstand scrutiny for due process purposes.

II. THE APPLICABLE FEDERAL LAW WAS DISREGARDED BY THE COURTS BELOW

Petitioner's federal actions gave rise to claims of federal rights and remedies (JA 2213-2299; 57-92a) The jurisdictional basis to sue the Red Cross in federal court as a federally chartered entity is established in American Nat'l Red Cross v. S.G. and A.E., 505 U.S. 247 (1992).

Whether petitioner's surprised response to the evidentiary information in the documents that had been recklessly placed in front of her can justify so drastic a sanction as claim preclusion accordingly is governed by federal, not state law, under Rule 501 of the Federal Rules of Evidence.

"Where, as here, there are both federal and state law claims, federal privileges rather than state privileges apply to all claims." Wei v. Bodner, 127 F.R.D. 91, 94 (D.N.J. 1989); von Bulow v. von Bulow, 811 F.2d 136, 141 (2d Cir.), cert. denied,

481 U.S. 1015 (1987) ("exclusionary rules and privileges are not favored . . . because they contravene a fundamental principle of our jurisprudence that 'the public . . . has a right to every man's evidence'" . . ., and that "'exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.' United States v. Nixon, 418 U.S. 683, 710 (1974).").

Had the courts below made appropriate findings and applied federal law on the privilege questions, or required the District Court to do so, rather than accept without analysis the propriety of a drastically punitive state law sanction based upon the purported violation of state discovery rules, then petitioner's federal court claims, including due process and claims governed by 42 U.S.C. § 1986, would have been accorded the protection that is required under the supremacy clause of Article VI of the Constitution. See Hathcock v. Navistar Int'l, 53 F.3d 36 (4th Cir. 1995); Satcorp v. China Nat'l Silk, 101 F.3d 3 (2d Cir. 1996).

Significant differences exist between New York and federal law. Under federal law, unlike New York law, the survival of a claim of privilege, the basis of the sanction imposed upon petitioner, is dependent upon the taking of sufficient precautions.

In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989), states the rule in federal cases as follows:

> "The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost even if the disclosure is inadvertent." (Emphasis added.)

In re Horowitz, 482 F.2d 72, 80-82 (2d Cir. 1973), cert. denied, 414 U.S. 867 (1973), quotes the applicable federal rule as follows: ". . . the risk of insufficient precautions must rest with the party claiming the privilege." See also Parkway Gallery v. Kittinger/Pa. H. Group, 116 F.R.D. 46, 50 (M.D.N.C. 1987); Carter v. Gibbs, 909 F.2d 1450 (Fed.Cir. 1990).

The federal "plain view" doctrine applicable to incriminating evidence is founded in logic and reason. As stated in Katz v. United States, 389 U.S. 347, 361 (1976):

> "Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." (Emphasis added.)

In addition, had the District Court examined the documents, the inapplicability of the claim of privilege under the tort-crime exception of federal law would have become apparent because they constitute direct evidence of a conspiracy to deprive petitioner of her equal protection rights under Kimes v. Stone, 84 F.3d 1121 (9th Cir. 1996), and also to deprive petitioner of a due process-protected liberty interest as set forth in Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623 (2d Cir. 1996), and Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 143-44 (2d Cir. 1993).

The penalty dismissal determination centered upon a privilege claim asserted by defendants' attorneys regarding documents that constitute direct evidence of a retaliatory and willful intention to resort to the abusively sexist and discriminatory "nuts or sluts" defense, which has been referred

to as "a favorite of the defense bar" in sexual harassment cases ("Prove the woman is crazy. Or demonstrate that she sleeps around." -- New York Observer 6/24/96, p. 24), by the Red Cross defendants.

Under federal law, the privilege claims were invalid because of their direct applicability to petitioner's claim of denial of equal protection under LaTrieste Restaurant & Cabaret, Inc. v. Port Chester, 40 F.3d 587, 590 (2d Cir. 1994), and the torts-crime exception to privilege claims approved in In re John Doe Corp., 675 F.2d 482, 489-493 (2d Cir. 1992).

The inconsistency between the Second Circuit's decision and Fourth Circuit's decision in United States v. Shaffer Equip. Co., 11 F.3d 450, 463 (4th Cir. 1993), is indicated by the following statement from the latter case:

> ". . . we also observe that through an outright dismissal, the defendants receive the benefit of a total release from their obligations under the environmental protection laws. This would provide the defendants relief far beyond the harm caused by the governments' attorneys' improper conduct and would frustrate the resolution on the merits of a case which itself has strong policy implications. Unfortunately, these factors were not adequately considered." (Emphasis added.)

III. CLAIM PRECLUSION DOES NOT APPLY TO THE PENALTY DISMISSAL OF STATE ACTIONS

In affirming dismissal of the two federal actions involving multiple counts and different parties on the basis of the penalty dismissal of a prior sexual harassment case, the doctrine of claim preclusion was extended to preclude litigation

of multiple disparate claims to a degree never previously permitted (57-92a; JA 2213-2299) in reported decisions. The disparity involved is summarized in Ms. Lipin's affidavits filed in the District Court.

Turner-Adeniji v. Accountants on Call, 892 F. Supp. 645, 647 (D.N.J. 1995), states:

> ". . . the Court does not believe that the full faith and credit doctrine requires that the [state court dismissal] judgment be given preclusive effect. While it is clear that under the full faith and credit doctrine a federal court must give a judgment the same effect as the court issuing the judgment, that doctrine is of doubtful application where, as here, the judgment of dismissal is a penalty dismissal and the issues involved are issues of federal civil rights, an area of obviously heightened federal concern. Although there appear to be no cases directly dealing with whether penalty dismissals should be given preclusive effect under full faith and credit, commentators have addressed this concern.
>
> * * * * *
>
> "It appears to the Court that the federalism concerns which enliven the full faith and credit doctrine are not implicated by a penalty dismissal. The only state interest involved appears to be enforcement of the state's own procedural rules. As noted in Wright, Miller, Cooper, foreclosure of further proceedings in New Jersey's courts is adequate protection of that interest."

Here, since the dismissed complaints are much broader in scope than that in the dismissed State complaint, the applicable doctrine is the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

The dismissal of petitioner's claims shown by her affidavit not to be transactionally related to the claims that arose from her termination (119-154a; 182-202a) involve the infringement of a separate constitutional right, the right of access to the federal judicial system, a right that is guaranteed by the First Amendment. See Bodie v. Connecticut, 401 U.S. 371 (1971).

A precondition of this Court's ruling in Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480 (1982), was that the merits of the plaintiff's dismissed civil rights claims had been adjudicated by the New York Courts, whereas no such determination of the merits of any of the 15 counts of dismissed claims ever occurred in the two separate federal cases that are here involved.

Petitioner's federal action in Second Circuit Dkt. No. 96-7195 asserts a claim under 42 U.S.C. § 1986. (JA 2268-2269) Under 42 U.S.C. § 1986 a federal remedy is created for the violation of constitutional rights. Her claim under 42 U.S.C. § 1986, with its one-year statute of limitations, did not accrue until discovery of its infringement occurred in 1991 when the documents were placed in the plain view of petitioner. (156a; 208a; 225-231a)

Petitioner's claim under 42 U.S.C. § 1986 thus involved events that were both subsequent to, and transactionally separate and apart from, events giving rise to the dismissed New York

action. (JA 2268-69) Also specifically alleged are violations of 42 U.S.C. § 1985(2) & (3).

The inconsistency between the Second Circuit's decision and the Ninth Circuit's decision in Kimes v. Stone, 84 F.3d 1121 (9th Cir. 1996), therefore warrants review of the dismissal of petitioner's claim under 42 U.S.C. § 1986.

Brooks v. Giuliani, 84 F.3d 1454 (2d Cir. 1996), cert. denied, ___U.S.___, 136 L. Ed.2d 375 (1997), is instructive because the Court indicated that at least one claim, like petitioner's 42 U.S.C. § 1986 claim herein, was pleaded on the basis of events and transactions that postdated those pleaded in the state court complaint, and therefore held not precluded. (84 F.3d at 1464-65.)

In Brooks, the Court also declined to give collateral estoppel effect ("issue preclusion") to constitutional issues that had been raised but not dealt with in the prior state litigation (84 F.3d at 1465, n.12).

See Baris v. Sulpicio Lines, Inc., 74 F.3d 567 (5th Cir. 1996) (similarly declining to give preclusive effect to the procedural dismissal of a prior state action for reasons not involving the decision on the merits even though such dismissal was explicitly stated to be on a "with prejudice" basis).

IV. PRECLUSIVE EFFECT SHOULD NOT HAVE BEEN GIVEN IN DEROGATION OF DUE PROCESS RIGHTS

The extension of a penalty imposed in state litigation to preclude additional federal causes of action based either on the doctrine of claim preclusion or issue preclusion, as here, involves infringement of due process rights. See Luneburg, 31 Vill. L. Rev. 81, at 163. As stated in Luneburg, id. at 162:

> "Kremer reiterates one of the fundamental principles of full faith and credit law: a violation of federal due process limitations in the rendition of a judgment deprives it of preclusive effect in the rendering state." (Footnote omitted.)

The guideposts required to be used in measuring whether a penalty imposed in state court litigation is invalidated because it is grossly excessive and therefore infringes fundamental notions of fairness are set forth by BMW of N. Am. v. Gore, __ U.S. __, 116 S. Ct. 1589 (1996). None of those guideposts were considered below.

As stated in Richards v. Jefferson County, Ala., __ U.S. __, 116 S. Ct. 1761, 1769 (1996):

> "To conclude that the suit may nonetheless be barred by the prior action in Bedingfield would thus be to deprive petitioners of their 'chose in action,' which we have held to be a protected property interest in its own right . . . . Thus, we are not persuaded that the nature of petitioners' action permits us to deviate from the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution." (Emphasis added.)

The lack of findings as to the responsibility of defendants' attorneys for placing the documents where they were found, or for creating the underlying condition used for the application of so drastic a sanction regarding a matter of first impression under state law negates the existence of due process.

Such findings did not exist. On the contrary, at the hearing on defendants' motion to dismiss, the New York state judge made the following observations (230-231a):

> "THE COURT. Counselor if I were the plaintiff -- her testimony isn't that she stole papers, but that she sat down and the papers were in front of her, right?
>
> "MR. JACOBY. [of Weil, Gotshal, & Manges, attorneys for defendants] Your Honor, these were papers on a counsel [conference] table. She didn't put them there. A lawyer put them there. Not her lawyer. The lawyer on the other side.
>
> * * * * *
>
> "THE COURT. You didn't bring anybody in to say that the papers were scattered, or the papers were on the other side of the table, or the papers were at the foot of the table, or the papers were in any other location. If I choose to believe the plaintiff then her testimony, and I was just looking for it, is that she sat down before argument started and when she sat down, right in front of her, four inches from the edge of the table, was a neat stack of papers." (Emphasis added.)

As a matter of federal due process, a claim of privacy regarding incriminating evidence that is in "plain view" does not survive the constitutional protection of the Fourth Amendment, see Katz v. United States, 389 U.S. 347 (1976), still less can the work product of recklessly careless lawyers survive their state law claim of confidentiality that is contrary

to the privilege rule followed in the federal courts as discussed in Point II above.

In addition, the state court's retroactive Decision and Order dated August 18, 1994, which was rendered more than two years after the first federal action was filed, enjoining all use of the discovered documents, stripped petitioner of her due process rights by unduly restraining petitioner's ability to litigate her claims under federal law. When faced with a full faith and credit issue, courts must be cognizant of the due process rights of the party affected. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482-483 (1981), states:

> "The State must . . . satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." (Emphasis added; footnote omitted.)

More recently, the importance of ensuring that due process is complied with when applying 28 U.S.C. § 1738 was emphasized in a separate opinion in Matsushita Elec. Indus. Co. v. Epstein, ___ U.S. ___, 116 S. Ct. 873, 884-85 (1996):

> "I write separately to emphasize a point key to the application of § 1738: A state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause. See Kremer, 456 U.S., at 482-483, 102 S. Ct., at 1898-1899." (Emphasis added.)

Here, the state court violated the mandate of Kremer and Matsushita by not properly considering the effect that its

retroactive decision and injunction would have on petitioner's due process right to litigate her claims in federal court.

Petitioner's equal protection claims satisfy the criteria set forth in LaTrieste Restaurant & Cabaret, Inc. v. Port Chester, 40 F.3d 587, 591 (2d Cir. 1994), in which a federal action was held not precluded by an earlier litigation in New York state.

The significance of the Second Circuit's confusion on whether claim preclusion or issue preclusion is the applicable doctrine is shown by the Ninth Circuit's decision in Spink v. Lockheed Corp., 60 F.3d 616, 624-25 (9th Cir. 1995), rev'd on other grounds, 116 S. Ct. 1783 (1996):

> "'Only a final judgment that is "sufficiently firm" can be issue preclusive.' Robi v. Five Platters, Inc., 838 F.2d 318, 326 (9th Cir. 1988) (citing Luben Indus. v. United States, 707 F.2d 1037, 1040 (9th Cir. 1983)). To ascertain the 'firmness' of a judgment, courts look to various factors, including whether the decision was tentative, whether the parties were fully heard . . . ." (Emphasis added.)

V. STATE COURT INTERFERENCE WITH FEDERAL COURT JURISDICTION CRIES OUT FOR THIS COURT'S ATTENTION

None of the cases relied on by the District Court involved state court litigation deliberately used as a weapon to interfere with claims asserted in pending federal litigation, as here, in violation of Donovan v. City of Dallas, 377 U.S. 408 (1964), which states (377 U.S. at 413):

> "Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they presented, and to appeal to the Court of Appeals from the District Court's dismissal. They have been punished both for prosecuting their federal-court case and for appealing it. They dismissed their appeal because of threats to punish them more if they did not do so. The legal effect of such a coerced dismissal on their appeal is not now before us, but the propriety of a state court's punishment of a federal-court litigation for pursuing his right to federal-court remedies is. That right cannot be taken away by the State. The Texas courts were without power to take away this federal right by contempt proceedings or otherwise." (Emphasis added; footnote omitted.)

The state court's January 9, 1992, dismissal order of petitioner's state court action failed to place any limitations on petitioner for pursuing her claims in federal court. (208-314a) The order did not designate that it was "with prejudice." Further, the order provided for no permanent injunction against the use of any information by the petitioner. (312a)

No objection was made to the wording of the dismissal order when it was written in the presence of defendants' attorneys without any "with prejudice" or injunctive language on January 9, 1992. (280-286a; 305-314a)

Following the issuance of the dismissal order, petitioner promptly exercised her right to file and prosecute a cause of action in the federal court system in order to protect her rights under the applicable statute of limitations provisions in 42 U.S.C. § 1986 and New York CPLR § 205(a).

The subsequent decision of a different state court judge two and a half years later is equivalent to the order that the Texas Court of Civil Appeals issued that enjoined the plaintiffs in Donovan v. City of Dallas, supra, from proceeding further in their federal action. In Donovan, the state court was held to be without power to take such action and deprive the plaintiffs their right to proceed in the federal court system, stating (Donovan v. City of Dallas, 377 U.S. at 412-13 (1964)):

> ". . . [Congress] has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here. And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself." (Emphasis added.)

As in Donovan, the state court here involved also issued an injunction that interferes with a federal court's ability to decide petitioner's claims on the merits. The New York court ". . . permanently enjoined [petitioner, her agents and attorneys] from disseminating to anyone or using in any way, for any purpose whatsoever, the information contained in defendants' counsel's documents . . . ." (340-341a)

Such an unlawful restraint prevents a federal court from providing petitioner with a full and fair opportunity to litigate her claims which arise under federal law in the federal court (104-105a; 111-112a; 130a; 205a).

The instant case involves a situation that is a fortiori to that presented in Donovan v. City of Dallas, supra. Before the state court's issuance of a retroactive order in August 1994, by a different judge, the first and second federal actions had been on file for more than a year. (334a)

The different judge in the dismissed state action purported to read the mind of the first judge (339a) and in the process expanded on what she did by issuing an injunction and retroactively declared that the prior dismissal had been on a "with prejudice" basis (334a), although the prior order did not so state as would have been required under New York CPLR 5013 (305a-314a).

The courts below improperly relied upon the retroactive order of the New York court despite the obvious fact that the filing of petitioner's first federal action could not properly be regarded as being foreclosed by a state court order yet to be penned more than two years in the future.

The giving of a preclusive effect to petitioner's federal litigation is contrary to General Atomic Co. v. Felter, 434 U.S. 12, 16-17 (1977), which states:

> "It is therefore clear from Donovan that the rights conferred by Congress to bring in personam actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective."

Nor was such preclusion of federal litigation intended by the New York Court of Appeals, which carefully limited the extent of its decision by the following statement in Lipin v. Bender, 84 N.Y.2d 562, 570 N.Y.S. 2d 744, 644 N.E.2d 1300 (1994):

> "Whether there is power--inherent or otherwise--to close the courthouse doors to a plaintiff with 'unclean hands' is not, however, the issue before us. Relief was sought under CPLR

> 3103(c), which was the basis of both courts' review, as it is ours." (329a; emphasis added.)

Thus the lower courts' use of the state court decision, limited as it was to narrow procedural grounds, to preclude petitioner's two federal court cases was both wholly unwarranted, and also violative of the federal rule, as stated in McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 115 S. Ct. 879, 885-86 (1995), rejecting the "unclean hands" defense as a basis for barring litigation in federal cases, such as is here involved, "where a private suit serves important public purposes."

CONCLUSION

The decision below cries out for this Court's intervention. A far more intensive appellate consideration of the punitive sanction/preclusion issue than it was accorded by the Second Circuit in its cursory inconsistent Summary Orders warrants review by this Court in the interest of the administration of justice.

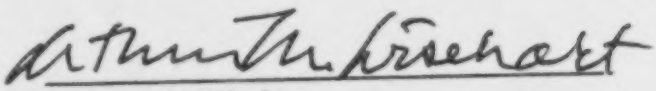
The preclusion of federal court claims as a result of the novel punitive application of state discovery rules, in a manner inconsistent with federal law making survival of the claim of privilege dependent upon the taking of sufficient precautions, warrants review by this Court because of the foreclosure of remedies needed for the protection of important federal constitutional, due process, and civil rights claims. See Luneburg, 31 Vill. L. Rev. 81, at 160.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

October 16, 1997

Respectfully submitted,

WISEHART & KOCH



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SDNY
93-CV-1334,
92-CV-4455,
Sand

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of May, one thousand nine hundred and ninety-seven.

PRESENT: HON. ELLSWORTH A.
VAN GRAAFEILAND,
HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,

Circuit Judges.

- -

JOAN CAROL LIPIN,

Plaintiff-Appellant,

-v.- No. 96-7195

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE P. WOLFF,

Defendants-Appellees.

- -

- -

JOAN CAROL LIPIN,

Plaintiff-Appellant,

-v.- No. 96-7193

AMERICAN RED CROSS IN GREATER NEW YORK; AMERICAN NATIONAL RED CROSS; ROBERT M. BENDER, JR.; JAMES T. BYRNE, JR.; CARL DESCH; BARBARA E. FLETCHER,

Defendants-Appellees.

- -

UNITED STATES COURT OF APPEALS
FILED MAY 22, 1997
GEORGE LANGE III, CLERK
SECOND CIRCUIT

APPEARING FOR PLAINTIFF-APPELLANT: ARTHUR M. WISEHART, Wisehart & Koch, New York, NY.

APPEARING FOR DEFENDANTS-APPELLEES: KEVIN P. HUGHES, Weil, Gotshal & Manges LLP, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Sand, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of the district court are **AFFIRMED**.

Joan Carol Lipin, a former employee of the American Red Cross in Greater New York ("ARCGNY"), appeals from the dismissal of her second and third lawsuits on the same subject. The District Court for the Southern District of New York (Sand, J.) dismissed both actions in their entirety on the ground of claim preclusion. In a Summary Order dated December 12, 1996, we affirmed the judgments of the district court on tne basis of both claim preclusion and issue preclusion.

On December 26, 1996, Lipin filed a petition for rehearing. Lipin's petition argues that different issues arise in the context of issue preclusion, some of which might entail arguably new law or might require additional factual inquiry. However, we may dispose of all of Lipin's allegations through the doctrine of claim preclusion. Accordingly, we are

expanding our analysis on the single, good and sufficient basis of claim preclusion. We therefore vacate our previous summary order and enter this one in its stead.

BACKGROUND

A. Lipin I

In August 1989, Lipin brought an action in New York state court against various defendants alleging sexual harassment and discrimination, wrongful termination, civil rights conspiracy and conspiratorial cover-up, defamation and blacklisting, breach of contract, and intentional infliction of emotional distress. See Lipin v. Bender, Index No. 15653/89(Lipin I). All of these claims arose out of her termination from ARCGNY in February 1988.

The New York Supreme Court, after a complete and thorough hearing, found that, on June 28, 1991, Lipin had taken a stack of documents belonging to defendants' counsel during a heated oral argument. The documents had been on a counsel table near Lipin during the proceeding; she took them, read them, and made copies of them. Lipin's attorney later attempted to achieve a settlement on the basis of the material contained in the stolen documents. On February 9, 1992, the Supreme Court (Moskowitz, J.), dismissed Lipin's state lawsuit because of the "egregious" and "heinous" behavior of Lipin and her attorney. The dismissal was affirmed by the Appellate Division and the Court of Appeals. Lipin v. Bender, 193 A.D.2d 424 (1st Dep't 1993); Lipin v. Bender, 84 N.Y.2d 562, 572 (1994).

On August 18, 1994, the Supreme Court issued a Decision and Order directing entry of Final Judgment dismissing the complaint "with prejudice," and permanently

enjoining Lipin's use of information from the stolen documents. This order was affirmed by the Appellate Division and the Court of Appeals. Lipin v. Bender, 216 A.D.2d 131 (1st Dep't 1995); Lipin v. Bender, 87 N.Y.2d 911 (1996); Lipin v. Bender, 88 N.Y.2d 866 (1996).

B. Lipin II

In June 1992, Lipin brought another action against the same defendants, as well as another ARCGNY employee and three of the attorneys involved in Lipin I, this time in the Southern District of New York ("Lipin II"). In addition to many of the same claims alleged in Lipin I, the new complaint alleged in essence that the defendants had engaged in a conspiracy to win the state court case by planting the documents in plain view for Lipin to take. The complaint included information taken from the contents of the purloined documents.

On July 7, 1992, the district court (Sand, J.) issued an order staying and sealing the Lipin II complaint until defendants could seek relief in state court for Lipin's misuse of information from the stolen documents. We denied three motions for a stay of this order.

C. Lipin III

On March 5, 1993, the day after the denial of Lipin's last stay motion in Lipin II, she filed a third complaint in the Southern District, against the three original defendants, as well as two board members and one employee of the New York Red Cross. Again, this complaint alleged claims similar to those alleged in Lipin I, as well as a conspiracy by persons involved in the defense of Lipin I to assure victory in the litigation.

Lipin III was eventually assigned to Judge Sand as a matter related to Lipin II.

On May 24, 1993, Lipin moved to lift the Lipin II stay. On July 7, the motion was denied, and Judge Sand stayed Lipin III on the same basis. When Lipin I was affirmed by the New York Court of Appeals in November 1994, the stays were partially lifted to allow defendants to file dismissal motions that would rely on the preclusive effect of the Lipin I dismissal. Lipin cross-moved for adjournment and other relief.

D. The District Court Decision

In an Opinion dated January 17, 1996, the district court dismissed both Lipin II and Lipin III pursuant to Fed.R.Civ.P. 12(b) (6). Applying New York's claim preclusion law, the district court examined each of Lipin's federal claims and found that they were all transactionally related to the claims in the state action, and were therefore precluded. As to her claims alleging sexual discrimination, sexual harassment, and wrongful termination, the court found that these had already been dismissed with prejudice. Similarly, her defamation and blacklisting claims were identical to those dismissed in Lipin I. Her claim for intentional infliction of emotional distress was deemed simply an alternative theory of relief regarding the allegations pled in Lipin I, and was therefore precluded. Finally, her breach of contract and quantum meruit/unjust enrichment claims were found to be based on nearly identical allegations from Lipin I, and were also therefore precluded.

As to her claims that the defense in Lipin I had destroyed and concealed evidence, the district court noted that these were alleged to be "the outgrowth of a conspiracy motivated by an invidiously discriminatory animus against [Lipin]," and were pleaded as part of the same claim as the

sexual harassment and discrimination claims. The court also pointed out that the piling up of specific details concerning a general conspiracy claim does not create multiple causes of action. Dlugash v. South Nassau Communities Hosp., 138 A.D.2d 343 (1988). Finally, the court noted that Lipin knew of the relevant facts during the course of the state litigation, and could have amended her state complaint to allege her obstruction of justice claims as evidentiary destruction and witness concealment claims at that time.

The district court then examined each of Lipin's cross-motions. Lipin moved to convert the 12(b) (6) motions into summary judgment motions on the ground that the motion papers included documents beyond the scope of the pleadings. The district court denied that motion on the ground that the documents at issue were records in a prior judicial proceeding, which a court may consider on a motion to dismiss without converting the motion into one for summary judgment. Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2d Cir. 1991). Finally, the district court denied Lipin's motion for an adjournment pursuant to Fed.R.Civ.P. 56(f), because Lipin did not lack facts essential to her opposition of defendants' motion to dismiss. The district court did not address Lipin's motions to disqualify defendants' attorneys, finding it unnecessary to do so in light of the court's other rulings.

Final judgment was entered on January 18, 1996, dismissing both Lipin II and Lipin III "with prejudice, in their entirety as to all defendants." This appeal ensued.

E. Contentions on Appeal

On appeal from the dismissal of Lipin II, Lipin contends that: (1) dismissal was inappropriate because disputed issues of material fact remained as to the circumstances surrounding her

acquisition of the documents; (2) the court's reliance on documents outside the pleadings rendered the motion one for summary judgment rather than dismissal; (3) the finding of preclusion was improper under both New York and federal law; (4) her attorney-misconduct claim under § 487 of the New York Judiciary Law was not subject to preclusion, because it did not mature until after Lipin I had concluded; (5) her §§ 1985 and 1986 claims, for conspiracy to interfere with her civil rights, were separate from and arose subsequent to Lipin I, and should not have been deemed precluded; and (6) the district court should have examined the issue of privilege under federal law, rather than accepting the state court's application of state law principles of privilege.

On appeal from the dismissal of Lipin III, Lipin argues that: (1) the federal complaint set forth causes of action that were distinct from the causes of action in Lipin I; (2) the district court should not have precluded her unjust enrichment claim, as it was not included in her state court complaint, was based on separate facts, and was asserted against different parties; (3) the district court's "full faith and credit" analysis erroneously analogized the dismissal of Lipin I to cases that were adjudicated on the merits; (4) the district court erred in failing to consider or to rule on Lipin's motion to disqualify defendants' counsel; and (5) the district court's actions unconstitutionally deprived her of her opportunity for redress.

DISCUSSION

I. Federal Jurisdiction

Under the Rooker-Feldman doctrine, we possess "no power whatsoever" to sit in direct review of state court judgments. Atlantic Coast Line RR. Co. v. Brotherhood of Locomotive Engineers,, 398 U.S. 281, 286 90 S. Ct. 1739,

1748 (1970); see also Gentner v. Shulman, 55 F.3d 87, 89 (2d Cir. 1995). In other words, we may not act as an appellate court for the purpose of overruling an erroneous state court judgment, even if the state judgment allegedly rests on an erroneous resolution of constitutional or federal law issues. See Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1143 (2d Cir. 1986), rev'd on other grounds, 107 S. Ct. 1519 (1987).

We have previously held that where a plaintiff did not raise a particular claim in the state court proceeding, but had the opportunity to do so, that claim is "inextricably intertwined" with those that the plaintiff did raise in the state courts; therefore, the unraised claim is also barred by the Rooker-Feldman doctrine. See Moccio v. New York State Office of Court Administration, 95 F.3d 195, 199-202 (2d Cir. 1996). This principle therefore takes in every claim that Lipin could have raised in the state court, as well as those she did raise.

II. Claim Preclusion

Lipin's claims in Lipin II and Lipin III fall into three basic categories: i) those that she raised in state court, plus or minus some additional facts, ii) those that she could have raised in the state court, again plus or minus some new factual discoveries, and iii) those that allege a conspiracy by the defense to win the state court litigation. All of her claims are precluded under New York law.

A. New York Claim Preclusion Law

We accord the state court judgment the same preclusive effect that the judgment would receive in state court. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75,

81 (1984); Allen v. McCurry, 449 U.S. 90, 96 (1980). See also 28 U.S.C. § 1738 (implementing the Full Faith and Credit Clause of the United States Constitution). We therefore look to New York's preclusion law to resolve this matter.

Claim preclusion "embodies the idea that a judgment between the same parties resolves all other claims arising out of the same transaction." International 800 Telecom Corp. v. Kramer, Levin, Nessen, Kamin & Frankel, 591 N.Y.S.2d 313, 316 (Sup. Ct. 1992) (citing Ryan v. New York Tel. Co., 62 N.Y.2d 494, 478 N.Y.S.2d 823 (1984)). New York courts have adopted the Restatement's transactional approach to claim preclusion: a final judgment bars any subsequent action based on "all or any part of the transaction, or series of connected transactions, out of which the [first] action arose." Restatement (Second) of Judgments § 24(1) (1982); see also Reilly v. Reid, 45 N.Y.2d 24, 29-30, 407 N.Y.S.2d 645 (1978); Bauer v. Planning Bd. of Village of Scarsdale, 587 N.Y.S.2d 726, 727 (App. Div. 2d Dep't 1992).

To determine whether the claims constitute a "transaction" or "series of transactions," we examine whether the facts are so related in time, space, origin, or motivation that [i] they form a convenient trial unit, and [ii] their treatment as a unit conforms to the parties' expectations or business understanding or usage. Restatement (Second) Judgments § 24(2); Coliseum Towers Assocs. v. County of Nassau, 637 N.Y.S.2d 972, 975 (App. Div. 2d Dept. 1996); Bauer, 587 N.Y.S.2d at 727.

Once a claim is brought to its final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if the latter are based on different theories, seek different remedies, or allege different facts. See Coliseum Towers, 637 N.Y.S.2d at 974; Bauer, 587 N.Y.S.2d at 727. This holds true even when the various legal theories

depend on "different shadings of the facts, or [ ] emphasize different elements of the facts," or necessitate "different measures of liability or different kinds of relief." Smith v. Russell Sage College, 54 N.Y.2d 185, 192 (1981); Baldo v. Marine Midland Bank N.A., 632 N.Y.S.2d 359, 360 (App. Div. 4th Dept. 1995); Restatement (Second) of Judgments § 61 cmt. c.

Moreover, the judgment is conclusive against the parties both as to those matters actually litigated and as to those matters that could have been litigated. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981); Weinstein, New York Civil Practice, ¶ 5011.17 (citing numerous cases). See also Nevada v. United States, 463 U.S. 110, 129-30, 103 S. Ct. 2906, 2918 (1983) (Once a final judgment has been entered, "[i]t is a finality as to the claim or demand in controversy . . . not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.") (internal quotations omitted).

B. Preclusive Effect of the Penalty Dismissal

Lipin argues that the state court's dismissal of Lipin I "with prejudice" was not a decision "on the merits" for purposes of claim preclusion. See Kremer v. Chemical Constr. Corp., 456 U.S. 461, 467 n.6, 102 S. Ct. 1883 (1982) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). In this case, we need not consider what the state court would do in such a situation, because the state court has already provided its answer: Lipin may not pursue her claims any further. See Lipin v. Bender, 216 A.D.2d 131, 629 N.Y.S.2d 3, 3 (App. Div. 1st Dep't 1995)

("To allow plaintiff to commence a new action would be to circumvent the clear intent of the prior order [of dismissal].), appeal dismissed, 88 N.Y.2d 866, 644 N.Y.S.2d 685 (1996). See also Angel v. Bullington, 330 U.S. 183, 190, 67 S. Ct. 657, 661 (1947) ("It is a misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation.")

On February 9, 1992, the Supreme Court (Moskowitz, J.), dismissed the state lawsuit in its entirety:

> After reviewing all of the case law in this area, I have to conclude that the actions of the plaintiff and her attorney were so egregious in taking this material that was clearly the attorney's work product, clearly interviews with the defendant's employees, clearly not for perusal by any other attorney or litigant in this litigation, so heinous that the only remedy, as much as I dislike to do this, is to dismiss the lawsuit.
> Otherwise, there is no meaning to privilege, there is no meaning to conduct among attorneys, and there is no rule of law.
> **(J.A. 1167i-1167j)**
>
> * * *
>
> And I am also aware that this lawsuit is important to the plaintiff. However, she was the one who read these materials. Whatever she thought was in this material did not justify taking this confidential information. She has to then suffer the consequences of the conduct.
> **(J.A. 1167k)**

Justice Moskowitz subsequently recused herself.[1]

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[1] The exchange leading to Justice Moskowitz's recusal went as follows:

The Court: Mr. Wisehart- -

Mr. Wisehart: I insist on being heard. If you are going to send me to the tombs because I want to be heard, you go ahead and do it. It says "In God We Trust" up there. We do not trust in this court as it is presently constituted.

The Court: I am directing the Court Reporter to take what I am saying and what nobody else is saying. And sit down, Mr. Wisehart.

> The material that Mr. Wisehart has provided on the recusal subject is so scurrilous and so baseless and so ridiculous that I cannot even begin to be fair to any parties in this case after reading this.
>
> I am so concerned about this that if it were under his affirmation instead of his client's affidavit, I would feel compelled to turn this over to the grievance committee. Because for an attorney to stand up in court and address the Court the way Mr. Wisehart did last time, and to supply the court with such ridiculous[,] . . . such off-the wall allegations about a sitting judge is so egregious that I really can't even see and I can't even look at this case anymore and dispense justice.
>
> Now, that means Mr. Wisehart has

The dismissal was affirmed by both the Appellate Division and the Court of Appeals. See Lipin v. Bender, 193 A.D.2d 424, 597 N.Y.S.2d 340 (1st Dep't 1993); Lipin v. Bender, 84 N.Y.2d 562, 572, 620 N.Y.S.2d 744 (1994). The Appellate Division commented that Lipin's "attempt to portray the defendants as having engaged in dilatory and sharp practices appears to have but one purpose- -to obscure the issue of her own misconduct." 597 N.Y.S.2d at 343. The Court of Appeals then held that the dismissal was within the trial court's power to issue protective orders under CPLR 3103,[2] and that it was

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> accomplished exactly what he set out to accomplish, which is to obtain my recusal from this case. But I am not doing it for the reasons that his clients set forth in an affirmation, because I don't even understand them. . . .
>
> * * *
>
> I don't have to stand up in a courtroom and be addressed by an attorney, who is supposedly an officer of the court, in a manner that Mr. Wisehart addressed me last week and the manner he addressed me this week. And I will not listen this week. I recuse myself. That's it.

Mr. Wisehart: I demand to be heard. I am an attorney nearing the end of my career.

J.A. 331-334.

[2] Lipin emphasizes the Court of Appeals' statement that the issue before the Court was not [w]hether there is power- -inherent or otherwise- -to close the courthouse doors to a

"a proper exercise of the trial court's discretion." 620 N.Y.S. at 748-49. The Court of Appeals noted that Lipin had "knowingly and deliberately intruded herself into plainly private communications between defendants and their attorney, and by retaining and hand-copying the documents preserved the information gleaned for maximum advantage to herself (and maximum disadvantage to defendants) in the litigation," and pointed out that the knowledge Lipin had gained could "never be purged." 620 N.Y.2d at 748.

"On August 18, 1994, the Supreme Court (Schoenfeld, J.) granted defendants' motion to dismiss Lipin's lawsuit with prejudice and to permanently enjoin the use of the information from the stolen documents. **(J.A. 1116-22, 1168-69)**. In his Decision and Order, Justice Schoenfeld stated:

It is clear from Justice Moskowitz's opinion that she had intended her dismissal to be "with prejudice." Cf. Strange v. Montefiore Hospital and Medical Center, 59 N.Y.2d 737[, 738] (1983) (summary judgment dismissing a medical malpractice action in which an order of preclusion had been entered against plaintiff was on the merits for res judicata purposes, since to hold otherwise would allow plaintiff to 'circumven[t] the preclusion decree.[']).

(J.A. 1120). See also Weinstein, New York Civil Practice ¶

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plaintiff with 'unclean hands.'" 620 N.Y.S.2d at 747. However, the Court made this statement merely to note that the trial court had dismissed the lawsuit under CPLR 3103(c), which deals with the scope of protective orders for disclosure abuses, rather than on the basis of the "unclean hands" doctrine. See id.

5011.11 (New York courts have ruled that dismissals as sanctions to prevent disregard or abuse of procedural rules were determinations on the merits) (citing cases).

In affirming the Supreme Court's order, the Appellate Division stated:

> Although [Justice Moskowitz's] order did not specifically recite that the dismissal was "on the merits," it is clear from the prior Judge's stated reasons and the context of the proceedings, including the two affirmances, that the intent of the prior order was just that, to sanction plaintiff in the severest possible manner for having purloined privileged documents by dismissing her action with prejudice to the commencement of new proceedings . . . To allow plaintiff to commence a new action would be to circumvent the clear intent of the prior order.

Lipin v. Bender, 629 N.Y.S.2d at 3 (emphasis added). The Court of Appeals dismissed the appeal. See Lipin v. Bender, 88 N.Y.2d 866, 644 N.Y.S.2d 685 (1996) .

We have no doubt as to whether New York would allow Lipin to litigate her claims anew. The New York courts have expressly answered the question: Lipin may not pursue her claims any further. Accordingly, the claims are precluded.

C. The Claims That Postdate the Dismissal of Lipin I

Lipin argues that because some of her claims did not arise until after her state case was dismissed, these claims are

not precluded. These include: 1) attorney misconduct pursuant to § 487 of the New York Judiciary Law and 2) conspiracy to interfere with her civil rights. As noted previously, however, once a claim is brought to its final conclusion, all other claims arising out of the same series of transactions are barred, even if they are based on different theories, seek different remedies, or allege different facts. See Bauer, 587 N.Y.S.2d at 727; Coliseum Towers, 637 N.Y.S.2d at 974. We reiterate that this is true even when the various legal theories depend on different shadings of the facts or emphasize different elements of the facts. Smith, 54 N.Y.2d at 192; Baldo, 632 N.Y.S.2d at 360.

The application of these cases is particularly appropriate and necessary here, where the incidents that supposedly postdate the dismissal of the case are no more or less than allegations that Lipin has now learned of circumstances and wrongs committed during the litigation that caused her to lose her case. If there are circumstances that justify reopening the case, state law and procedure will govern whether those allegations can be presented to the state court, and whether she prevails, and any federal constitutional challenge to those determinations can be heard in state court, and appealed from there to the United States Supreme Court. Lipin may be of the view that this would be futile because the state courts have evidently concluded that she is a thief whose misconduct precludes her claims on the merits. Maybe. But the federal courts lack jurisdiction to consider her appeal from state rulings.

D. Lipin's Challenge to the Constitutionality of the State Proceedings

In Lipin II, Lipin alleged that the limited and restrictive discovery rules, practices, and procedures in the New York state courts were inadequate and prejudicial, thereby denying her due process. ¶¶ 135-36. We deny the state proceedings preclusive

effect only if they were "so fundamentally flawed as to be denied recognition under § 1738." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480 (1982). We have no reason here to "doubt the quality, extensiveness, or fairness of procedures followed in [the] prior litigation," id. at 481, because the state court proceedings were thorough, complete, and fair to all parties, as indicated by an extensive record. The fact that Lipin's position was ultimately rejected by the state courts after careful deliberation does not constitute a denial of due process.

We have examined all of Lipin's remaining contentions, and find them to be without merit. For the reasons set forth above the judgments of the district court are AFFIRMED.

/s/

ELLSWORTH A. VAN GRAAFEILAND, U.S.C.J.

/s/

DENNIS JACOBS, U.S.C.J.

/s/

GUIDO CALABRESI, U.S.C.J.

DGJ

SDNY
93-CV-1334,
92-CV-4455,
Sand

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of December, one thousand nine hundred and ninety-six.

PRESENT: HON. ELLSWORTH A.
VAN GRAAFEILAND,

HON. DENNIS JACOBS,

HON. GUIDO CALABRESI,

Circuit Judges.

- -

JOAN CAROL LIPIN,

Plaintiff-Appellant,

v. No. 96-7195

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF,

Defendants-Appellees.

- -

- -

JOAN CAROL LIPIN,

Plaintiff-Appellant,

v. No. 96-7193

AMERICAN RED CROSS IN GREATER NEW YORK; AMERICAN NATIONAL RED CROSS; ROBERT M. BENDER, JR.; JAMES T. BYRNE, JR.; CARL DESCH; BARBARA E. FLETCHER,

Defendants-Appellees.

- -

UNITED STATES COURT OF APPEALS
FILED DECEMBER 12, 1996
GEORGE LANGE III, CLERK
SECOND CIRCUIT

APPEARING FOR PLAINTIFF- ARTHUR M. WISEHART,
APPELLANT: Wisehart & Koch
New York, NY.

APPEARING FOR DEFENDANTS- KEVIN P. HUGHES,
APPELLEES: Weil, Gotshal & Manges LLP,
New York, NY.

Appeal from the United States District Court for the Southern District of New York (Sand, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of the district court are **AFFIRMED**.

Joan Carol Lipin, a former employee of the American Red Cross in Greater New York ("ARCGNY"), appeals from her second and third litigations on the same subject. The District Court for the Southern District of New York (Sand, J.) dismissed both actions in their entirety on the ground of claim preclusion.

Background

A. Lipin I

In August 1989, Lipin brought an action in New York state court against various defendants alleging sexual harassment and discrimination, wrongful termination, civil rights conspiracy and conspiratorial cover-up, defamation and blacklisting, breach of contract, and intentional infliction of

emotional distress. See Lipin v. Bender, Index No. 15653/89 (Lipin I). All of these claims arose out of her termination from ARCGNY in February 1988.

The New York Supreme Court, after a full and fair hearing, found that, on June 28, 1991, Lipin had taken a stack of documents belonging to defendants' counsel during a heated oral argument. The documents had been on a counsel table near Lipin during the proceeding; she read them, took them, and made copies of them. Lipin's attorney later attempted to achieve a settlement on the basis of the material contained in the stolen documents. On February 9, 1992, the Supreme Court (Moskowitz, J.), dismissed the state lawsuit because of Lipin's and her attorney's "egregious" and "heinous" behavior. The dismissal was affirmed by the Appellate Division and the Court of Appeals. Lipin v. Bender, 193 A.D.2d 424 (1st Dep't 1993); Lipin v. Bender, 84 N.Y.2d 562, 572 (1994).

On August 18, 1994, the Supreme Court issued a Decision and Order directing entry of Final Judgment dismissing the complaint "with prejudice," and permanently enjoining the use of the information from the stolen documents. This order was affirmed by the Appellate Division and the Court of Appeals. Lipin v. Bender, 216 A.D.2d 131 (1st Dep't 1995); Lipin v. Bender, 87 N.Y.2d 911 (1996); People v. Bender, 88 N.Y.2d 866 (1996).

B. Lipin II

In June 1992, Lipin brought another action against the same defendants, as well as another ARCGNY employee and three of the attorneys involved in Lipin I, in the Southern District of New York ("Lipin II"). In addition to many of the same claims alleged in Lipin I, the new complaint alleged in essence that the defendants had engaged in a conspiracy to win the state court case by planting the documents in plain view for

Lipin to take. The complaint also included information taken from the contents of the documents.

On July 7, 1992, the district court (Sand, J.) issued an order staying and sealing the Lipin II complaint until defendants could seek relief in state court for Lipin's misuse of information from the stolen documents. We denied three motions for a stay of this order.

C. Lipin III

On March 5, 1993, the day after Lipin's last stay motion in Lipin II was denied, she filed a third complaint in the Southern District, against the three original defendants, as well as two board members and one employee of the New York Red Cross. Again, this complaint alleged claims similar to those alleged in Lipin I, as well as a conspiracy to guarantee victory in the state court litigation. Lipin III was eventually assigned to Judge Sand as a matter related to Lipin II.

On May 24, 1993, Lipin moved to lift the Lipin II stay. On July 7, the motion was denied, and Judge Sand stayed Lipin III on the same basis. When Lipin I was affirmed by the Court of Appeals in November 1994, the stays were partially lifted to allow defendants to file motions to dismiss that relied upon the preclusive effect of the dismissal of Lipin I. Lipin cross-moved for adjournment and other relief.

D. The District Court Decision

In an Opinion dated January 17, 1996, the district court dismissed both Lipin II and Lipin III pursuant to Fed.R.Civ.P. 12(b) (6). Following New York's claim preclusion law, the district court examined each of Lipin's federal claims and found that they were all transactionally related to the claims in the state action, and were therefore precluded: As to her claims for

sexual discrimination, sexual harassment, and wrongful termination, the court found that these had already been dismissed with prejudice. Similarly, her defamation and blacklisting claims were identical to those dismissed in Lipin I. Her intentional infliction of emotional distress claim was deemed simply an alternative theory of relief regarding the allegations pled in Lipin I, this was precluded. Finally, her breach on contract and quantum meruit/unjust enrichment claims were found to be based on nearly identical allegations from Lipin I, and were therefore precluded.

As to her destruction and obfuscation of evidence claims, the district court noted that these were alleged to be "the outgrowth of a conspiracy motivated by an invidiously discriminatory animus against [Lipin]," and were pleaded as part of the same claim as the sexual harassment and discrimination claims. The court also pointed out that the piling up of specific details concerning a general conspiracy claim does not create multiple causes of action. Dlugash v. South Nassau Communities Hospital, 138 A.D.2d 343 (1988). Finally, the court noted that Lipin knew of the relevant facts during the course of the state litigation, and could have amended her state complaint to allege her obstruction of justice claims as evidentiary destruction and witness concealment claims at that time.

The district court then examined each of Lipin's cross-motions. Lipin moved to convert the 12(b) (6) motions into summary judgment motions on the ground that the motion papers included documents beyond the scope of the pleadings. The district court denied the motion, on the ground that the documents at issue were records in a prior judicial proceeding, which a court may consider on a motion to dismiss without converting the motion into one for summary judgment. Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2d Cir. 1991). Finally, the district court denied Lipin's motion for an

adjournment pursuant to Fed.R.Civ.P. 56(f), because Lipin no longer lacked facts essential to her opposition of defendants' motion to dismiss. The district court did not address Lipin's motions to disqualify defendants' attorneys, finding it unnecessary to do so in light of the court's other rulings.

Final judgment was entered on January 18, 1996, dismissing both Lipin II and Lipin III "with prejudice, in their entirety as to all defendants." This appeal ensued.

E. Contentions on Appeal

On appeal from the dismissal of Lipin II, Lipin contends that: (1) dismissal was inappropriate because disputed issues of material fact remained as to the circumstances surrounding her acquisition of the Weil, Gotshal documents; (2) the court's reliance on documents outside the pleadings rendered the motion one for summary judgment rather than dismissal; (3) the finding of preclusion was improper under both New York and federal law; (4) her claim under § 487 of the New York Judiciary Law was not subject to preclusion, because it did not mature until after Lipin I had concluded; (5) her §§ 1985 and 1986 claims were separate from and arose subsequent to Lipin I, and should not have been deemed precluded; and (6) the district court should have examined the issue of privilege under federal law, rather than accepting the state court's application of state law principles of privilege.

On appeal from the dismissal of Lipin III, Lipin argues that: (1) the federal complaint set forth causes of action that were distinct from the causes of action in Lipin I; (2) the district court should not have precluded her unjust enrichment claim, as it was not included in her state court complaint, was based on separate facts, and was asserted against different parties; (3) the district court's full faith and credit, analysis

erroneously analogized the dismissal of Lipin I to cases that were adjudicated on the merits; (4) the district court erred in failing to consider or to rule on Lipin's motion to disqualify defendants' counsel; and (5) the district court's actions unconstitutionally deprived her of her opportunity for redress.

Discussion

We conclude that Lipin's claims in both Lipin II and Lipin III are precluded by the state court's resolution of Lipin I, substantially for the reasons stated in Judge Sand's Opinion of January 17, 1996.

Lipin urges that claim preclusion does not reach all of her claims in the two federal lawsuits. We disagree. In so doing, we broaden the analysis to consider issue preclusion because it is easier to do so than to rebut one by one Lipin's arguments concerning the scope and effect of claim preclusion. When reviewing the decision of a district court, we may affirm that decision on any ground supported by the record. See Barbara v. New York Stock Exchange, Inc., 99 F.3d 49, 57-58 (2d Cir. 1996); I. Meyer Pincus & Assocs. v. Oppenheimer & Co., Inc., 936 F.2d 759, 761 (2d Cir. 1991).

Insofar as some of Lipin's claims derive from her assertion that the stolen documents were "planted" as part of a litigation strategy to entice her to take them, these claims are barred under the doctrine of issue preclusion. The state court found that Lipin stole documents from defendants' counsel. We accord the resulting judgment the same preclusive effect as that judgment would receive in the state court. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); Allen v. McCurry, 449 U.S. 90, 96 (1980). See also 28 U.S.C. § 1738 (implementing the "full faith and credit clause" of the United States Constitution). We therefore look to New York's preclusion law to resolve this matter.

Issue preclusion may be invoked "to prevent a party from relitigating an issue decided against that party in a prior adjudication." Staatsburg Water Co. v. Staatsburg Fire Dist., 72 N.Y.2d 147, 152 (1988). An issue is subject to preclusion by prior adjudication, when 1) there is an identity of issues between the prior and the present actions, and 2) there has been a full and fair opportunity to contest the decision claimed to be controlling. Id. at 153; Schwartz v. Public Administrator of Bronx County, 24 N.Y.2d 65, 71 (1969).

Any question as to the mode of the documents' escape into Lipin's possession has been fully and fairly examined in the State Supreme Court, and has been affirmed by both the Appellate Division and the Court of Appeals. The issue is therefore precluded, and Lipin may not relitigate it, under any name, guise, or theory.

We have examined all of Lipin's remaining contentions, and find them to be without merit. For the reasons set forth above, the judgments of the district court are AFFIRMED.

/s/

ELLSWORTH A. VAN GRAAFEILAND, U.S.C.J.

/s/

DENNIS JACOBS, U.S.C.J.

/s/

GUIDO CALABRESI, U.S.C.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff, 93 Civ. 1334 (LBS)

-against- OPINION

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., JAMES T. BYRNE, JR., CARL DESCH, and BARBARA FLETCHER

Defendants.

JOAN CAROL LIPIN,

Plaintiff, 92 Civ. 4455 (LBS)

-against- OPINION

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF,

Defendants.

APPEARANCES: January 17, 1996

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-Of Counsel-

HONORABLE LEONARD B. SAND, U.S.D.J.

Copies Mailed to Counsel of Record 1/17/96

SAND, J.

Plaintiff Joan Carol Lipin ("Lipin"), a former employee of the American Red Cross in Greater New York ("ARCGNY"), brings these related actions against, collectively, American National Red Cross ("ANRC"), ARCGNY, various members of ARCGNY, including Robert M. Bender, Jr., and certain members of the defense team, specifically three attorneys from Weil, Gotshal & Manges, which represents defendants. Within the two actions, plaintiff asserts numerous and sweeping allegations of misconduct, including sexual harassment and discrimination, wrongful termination, civil rights conspiracy, conspiratorial cover-up, defamation, blacklisting, breach of contract, unjust enrichment, and intentional infliction of emotional distress.

Defendants now move, pursuant to Fed. R. Civ. P. 12(b)(6), for dismissal of both actions on grounds of preclusion; plaintiff cross-moves for adjournment and other relief.[3] For

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[3] In her cross-motions, plaintiff requests that the Court adjourn consideration of defendants' motions to dismiss. First, plaintiff contends that defendants' Rule 12(b) (6) motions should be converted to Rule 56 motions for summary judgment because defendants rely in their motions on materials outside the pleadings. Second, because Rule 56(f) permits a continuance when a party has insufficient information with which to oppose a motion, plaintiff argues that such a continuance is warranted until the state appellate courts have conclusively determined whether the New York Supreme Court's January 9, 1992 dismissal of plaintiff's state action was with prejudice. Third, plaintiff seeks to postpone consideration of defendants' motions pending this Court's ruling on her cross-motions to disqualify defendants' attorneys. Finally, plaintiff seeks recovery of damages pursuant to 28 U.S.C. §

the reasons set forth below, the Court grants defendants' motions and dismisses both actions, with prejudice, as to all defendants.

Background

1. State Proceedings

In February 1988, Lipin was fired as Manager of Health Services for ARCGNY. Thereafter, she commenced an action[4] in New York state court against ANRC, ARCGNY, and Robert Bender, Jr. ("Bender"), her former supervisor. Lipin's complaint alleged sexual harassment and discrimination, wrongful termination, civil rights conspiracy and conspiratorial cover-up, defamation and blacklisting, breach of contract, and intentional infliction of emotional distress.

On January 9, 1992, the New York Supreme Court, New York County (Moskowitz, J.), dismissed Lipin's state lawsuit "in its entirety" due to "egregious" and "heinous" actions by Lipin and her attorney, Arthur M. Wisehart ("Wisehart").[5] Order and Transcript, dated January 9, 1992 ("Dismissal Order"), at 8-9. Except where noted, we rely on Lipin v. Bender, 644 N.E.2d 1300 (N.Y. 1994), and Lipin v.

1927 and Rule 56(g), including costs, expenses and attorney's fees.

[4] Lipin v. Bender, Index No. 15653/89 ("Lipin I").

[5] Since her termination by ARCGNY, plaintiff has been employed by Wisehart as a salaried paralegal.

Bender, 193 A.D.2d 424 (N.Y. App. Div. 1993), for the following narrative.

The extended misconduct prompting dismissal began on June 28, 1991, at a pretrial proceeding before a Special Referee. As Lipin took her seat at the commencement of the proceeding, she noticed a stack of documents in front of her on the table. The top page of the stack indicated that the documents contained internal memoranda prepared by defendants' attorneys. During a heated exchange between counsel concerning discovery matters, Lipin slipped the documents off the table and onto her lap. Discovering that the documents contained internal memoranda prepared by opposing counsel, including notes of interviews with Red Cross personnel and deposition digests, Lipin then secretly appropriated the documents. During a lunch break, Lipin told Wisehart about the documents and, using Wisehart's office, made three sets of photocopies.

After examining the purloined documents, Wisehart determined that they contained inflammatory references to plaintiff and evidence of a conspiracy to destroy her career. Lipin and Wisehart then confronted defendants with the documents and demanded Bender's immediate termination, a substantial money settlement, and other reparations. Wisehart refused to divulge how Lipin had obtained the documents, asserting only that she had done so legitimately.

On July 3, 1991, defendants sought from the state court and were granted a protective order requiring that Lipin turn over to Wisehart "everything in her possession" concerning the defendants' documents, and that Wisehart secure all copies in his vault. Lipin gave the documents to Wisehart, but not before defying court orders by hand-copying parts of them from a set she had kept at home.

Defendants then moved to dismiss the complaint, citing Lipin's ethical violations and the irreparable prejudice caused by her intimate knowledge of their work product documents. In a decision read into the record, Justice Moskowitz emphatically granted the defendants' motion to dismiss:

> There is no justification for the actions that the plaintiff took in this case, and that Mr. Wisehart then took with her. . . [Their actions] were so egregious in taking this material that was clearly the attorney's work product, clearly interviews with the defendant's employees, clearly not for perusal by any other attorney or litigant in this litigation, so heinous that the only remedy, as much as I dislike to do this, is to dismiss the lawsuit. Otherwise, there is no meaning to privilege, there is no meaning to conduct among attorneys, and there is no rule of law.
> Whatever was in these papers was confidential. That confidentiality was broken. It was repeatedly broken by both the litigant and the attorney, and cannot be countenanced by the Court.
> Therefore, I am dismissing the lawsuit in its entirety. It is unnecessary to consider anything else.

Dismissal Order at 8-9. Justice Moskowitz also directed Lipin and Wisehart to return to defendants' counsel all copies of, and any notes pertaining to, the pilfered documents.[6] Id. at 11-12.

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[6] Pursuant to the August 18, 1994, Decision and Order of Justice Schoenfeld (who assumed control of the case after Justice Moskowitz recused herself), final judgment was entered on August 31 dismissing Lipin's complaint, with prejudice, and

Both the Appellate Division, First Department and the Court of Appeals unanimously affirmed the legitimacy and appropriateness of the dismissal,[7] and the Appellate Division confirmed that the dismissal was with prejudice.[8]

2. Federal Proceedings

Even before she had perfected her appeal of the Dismissal Order to the Appellate Division, Lipin commenced an

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making permanent Justice Moskowitz's previously issued suppression order enjoining the use and dissemination of, for any purpose whatsoever, the information contained in the appropriated documents.

[7] See Lipin, 644 N.E.2d at 1303-05; Lipin, 193 A.D.2d at 427-28. On January 10, 1995, the Court of Appeals denied Lipin's motion for reargument or reconsideration.

[8] Plaintiff had contested whether Justice Moskowitz's dismissal order was with prejudice. Justice Schoenfeld found it "clear from Justice Moskowitz's opinion that she intended her dismissal to be 'with prejudice'". Decision and Order, dated August 18, 1994, at 5. On June 20, 1995, the Appellate Division unanimously affirmed Justice Schoenfeld's order. See Lipin v. Bender, 629 N.Y.S.2d 3 (App. Div. 1995). On September 14, 1995, the Appellate Division denied plaintiff's motion for reargument in the Court of Appeals.

action ("Lipin III") in this Court.[9] Although the Amended Complaint in Lipin II added as defendants attorneys on the defense team and additional members of the Red Cross, it restated the Lipin I allegations of sexual harassment and discrimination, wrongful termination, defamation and blacklisting, breach of contract, and intentional infliction of emotional distress. The Lipin II Amended Complaint also expanded the Lipin I conspiracy and cover-up allegations into a broader obstruction of justice claim encompassing destruction and obfuscation of evidentiary documents and concealment of a deponent. On July 7, 1992, this Court stayed Lipin II and sealed plaintiff's complaint pending resolution in state court of matters related to the state proceedings.[10]

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[9] Plaintiff commenced Lipin v. American National Red Cross, 92 Civ. 4455 (LBS) ("Lipin II"), on June 17, 1992.

[10] This Court stayed Lipin II until defendants could seek relief in the New York Supreme Court for plaintiff's alleged misuse of the information contained in the purloined documents. By Order to Show Cause, dated July 10, 1992, defendants requested suppression of the information. The Supreme Court granted such relief, subject to the outcome of further proceedings. See Decision and Order, dated December 28, 1992 (Ciparick, J.).

On August 4, 1992, while matters were pending in state court, plaintiff filed a notice of appeal with the United States Court of Appeals for the Second Circuit from this Court's stay order; on September 3, 1992, plaintiff also filed a motion in the Second Circuit seeking leave to proceed in this Court. On September 22, the Second Circuit dismissed the appeal and denied the motion. See Order, dated September 22, 1992.

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After repeated rejections by this Court of Lipin's attempts to lift or evade the Court's stay of Lipin II,[11] Lipin commenced yet another federal action ("Lipin III").[12] The Amended Complaint in Lipin III again restated Lipin's claims of sexual harassment and discrimination, and expanded her conspiracy/obstruction of justice claim to include additional defendants.

Now before the Court are defendants' Rule 12(b) (6) motions to dismiss both Lipin II and Lipin III in their entirety. Based on the affirmance by the New York Court of Appeals of Justice Moskowitz's dismissal of Lipin I, as well as the affirmance by the Appellate Division of Justice Schoenfeld's entry of final judgment dismissing Lipin I with prejudice,[13]

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[11] Plaintiff sought to lift the stay in Lipin II based upon Justice Moskowitz's recusal; we denied this motion. See Transcript of Proceedings, dated October 29, 1992. On November 12, 1992, plaintiff moved to recuse this Judge; we again denied plaintiff's motion. On March 4, 1993, this Court denied plaintiff's further motion to vacate the stay order.

[12] Plaintiff commenced Lipin v. American Red Cross in Greater New York, 93 Civ. 1334 (LBS) ("Lipin III"), on March 5, 1993.

[13] As noted above in note 6, subsequent to the return date of this motion, the New York Supreme Court, Appellate Division unanimously affirmed Justice Schoenfeld's order directing entry of final judgment dismissing the complaint with prejudice. See Lipin, 629 N.Y.S.2d 3.

defendants now contend that the claims in Lipin II and Lipin III are precluded on the basis of res judicata. In the alternative, defendants argue that the complaints should be dismissed on grounds of collateral estoppel.[14]

Taking the allegations of the complaints as true, as we must for purposes of Rule 12(b) (6) motions to dismiss, see Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Walker v. City of New York, 974 F.2d 293, 298 (2d Cir. 1992), the Court grants defendants' motions.

Discussion

1. Preclusion Analysis

A federal court must give to a state-court judgment the same preclusive effect as that judgment would be given under the law of the state in which it was rendered. Migra, 465 U.S. at 81; Allen v. McCurry, 449 U.S. 90, 96 (1980); Collard v. Incorporated Village of Flower Hill, 759 F.2d 205, 207 (2d Cir.) (per curiam), cert. denied, 474 U.S. 827 (1985); see also 28 U.S.C. § 738 (implementing U.S. Const. art. IV, § 1).[15]

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[14] In accordance with recent Supreme Court precedent, see, e.g., Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984), and the current Restatement (Second) of Judgments (1982), we hereinafter will speak of "res judicata" as "claim preclusion" and of "collateral estoppel" as "issue preclusion."

[15] Section 1738 provides in relevant part: "Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from

When a state court has adjudicated a claim or issue, the preclusion doctrines "not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." Allen, 449 U.S. at 95-96. Thus, federal preclusion law requires that we look to the preclusion law of New York State.

In applying the doctrine of claim preclusion, New York has adopted the "transactional analysis approach": "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred." O'Brien v. City of Syracuse, 429 N.E.2d 1158, 1159 (N.Y. 1981). In assessing whether claims are transactionally related, courts may consider such factors as whether "the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations." In re Reilly, 379 N.E.2d 172, 176 (N.Y. 1978) (quoting Restatement, Judgments 2d [Tent. Draft No. 1, 1973], § 61). Put another way, claims arise from the same transaction or series of transactions if they are "grounded on the same gravamen of the wrong upon which the action is brought." Smith v. Russell Sage College, 429 N.E.2d 746, 749 (N.Y. 1981) (citing In re Reilly, 379 N.E.2d at 175). Once this transactional relationship is established, it holds regardless of whether the claims are based upon different theories of liability, or seek different relief, or allege varying

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which they are taken."

Article IV, section 1 provides in relevant part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

facts. See id.

Applying this analysis, we find that the claims in plaintiff's federal actions are transactionally related to, if not indistinguishable from, those in her state action, and are therefore precluded. As Justice Moskowitz's January 9, 1992, dismissal of Lipin I constitutes a valid and final adjudication on the merits, which can carry preclusive effect in this court, plaintiff is therefore estopped from relitigating her claims in federal court.

2. Transactional Relatedness

a. Sexual Discrimination, Sexual Harassment, and Wrongful Termination Claims

Comparing plaintiff's state and federal complaints, we find that plaintiff's claims of sexual discrimination and harassment in Lipin I have essentially been cut and pasted onto the amended complaints in her federal actions. In Lipin II and Lipin III, as in Lipin I, plaintiff alleges that the Red Cross engaged in sexual discrimination throughout the organization. Lipin I, Complaint ("Lipin I Compl."), dated August 12, 1989, ¶¶ 17, 27-28, 71; Lipin II, Amended Verified Complaint ("Lipin II Compl."), dated June 23, 1992, ¶ 36; Lipin III, Amended Verified Complaint ("Lipin III Compl."), dated March 12, 1993, ¶ 52. In particular, plaintiff alleges that Bender, her supervisor, made repeated sexual advances toward her despite her repeated rebuffs. Lipin I Compl. ¶¶ 18-22, 26, 36, 38; Lipin II Compl. ¶¶ 40-45, 47, 61, 87-88; Lipin III Compl. ¶¶ 38, 41-49. Plaintiff alleges that as a result of her rejection, Bender became overly critical of plaintiff's work, devised for her increasingly complex and voluminous assignments, and denied her a promotion or pay raise. Lipin I Compl. ¶ 23;

Lipin II Compl. ¶¶ 49-50, 52, 58, 95-96; Lipin III Compl. ¶¶ 50, 53. When Lipin complained about Bender's actions to various Red Cross members, she discovered an alleged conspiracy of silence within the organization with respect to sexual harassment. Lipin I Compl. ¶¶ 29-34, 40; Lipin II Compl. ¶¶ 66-85; Lipin III Compl. ¶ 40, 54.

Plaintiff has already litigated in Lipin I the same sexual harassment and discrimination claims as in Lipin II and Lipin III. Having been dismissed with prejudice by the New York Supreme Court, the claims are precluded in this Court.

b. Destruction and Obfuscation of Evidence Claim

In both of her federal actions, plaintiff alleges a conspiracy in which defendants Bender, Fletcher, Jacoby, Baer, and Wolff colluded to deceive plaintiff and the courts by (1) destroying and obfuscating documents pertaining to plaintiff's work performance and relationships at Red Cross, and (2) orchestrating Fletcher's alleged evasion of her court-ordered deposition. See Lipin II Compl. ¶¶ 127-201; Lipin III Compl. ¶¶ 85-136. By virtue of this alleged destruction and concealment of favorable evidence, plaintiff contends that defendants hindered her pursuit of redress. See Lipin II Compl. ¶ 169; Lipin III Compl. ¶¶ 102, 108. Although we recognize that these claims were not stated in plaintiff's state complaint,[16] we find that they are precluded for several reasons.

First, we note that these obstruction of justice claims

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[16] Plaintiff did, however, raise such allegations at later stages of the Lipin I litigation. See infra n.15.

derive from the sexual harassment and wrongful termination claims in Lipin I and again in Lipin II and Lipin III. Plaintiff contends that defendants' alleged litigation misconduct interfered with her ability successfully to pursue her underlying sexual harassment and retaliatory termination claims. Plaintiff accordingly seeks "such relief as would have been available to her but for defendants' [interference]." Lipin III Compl. ¶¶ 102, 108; see also Lipin II Compl. ¶ 173. As discussed above, however, plaintiff is estopped from litigating those claims in this Court. Therefore, insofar as plaintiff seeks relief for damage to claims which are precluded, the Court can provide no remedy.

Second, even if plaintiff seeks recovery relating to other claims, her evidentiary tampering claim is still precluded. Defendants' alleged interference with her lawsuit was, in plaintiff's words,

> the outgrowth of a conspiracy motivated by an invidiously discriminatory animus against plaintiff and the class of Red Cross female career employees who oppose and object to the degradation of being compelled to perform important public services in a hostile work environment in which they are treated by male executives as playthings who are expected to make themselves available for sexual favors.

Lipin II Compl. ¶ 167; see also id. ¶ 172. We believe, and plaintiff's own characterization of defendants' conduct suggests, that the obstruction of justice claim is merely part and parcel of one elaborate conspiracy theory, in which defendants allegedly colluded (1) to protect sexual harassers and preserve a practice of sex discrimination, see Lipin I Compl. ¶¶ 27-33, 71; Lipin II Compl. ¶¶ 36, 62, 65-83; Lipin III Compl. ¶¶ 20-23, 52; (2) to devise retaliatory strategies by which to terminate, defame,

and blacklist plaintiff, see Lipin I Compl. ¶¶ 34-40, 58-68, 71; Lipin II Compl. ¶¶ 95-124, 191; (3) to entrap plaintiff by planting documents in front of her at the June 28, 1991 pretrial conference, see Lipin II Compl. ¶¶ 152-4, 182-88; (4) to destroy and obfuscate documentary evidence favorable to her litigation, see Lipin II Compl. ¶¶ 143-51, 192-200; Lipin III Compl. ¶¶ 66-69, 85-101, 114-130; and (5) to cover up the document destruction by "aiding and abetting . . . Fletcher in becoming a fugitive" prior to her scheduled deposition, see Lipin II Compl. ¶¶ 145-47, 197-98; Lipin III Compl. ¶¶ 120-29. Thus, plaintiff's allegations of evidentiary destruction and obfuscation are but factual elaborations of an overall retaliatory conspiracy theory, which was raised in Lipin I. See Lipin I Compl. ¶¶ 27-40, 58-68, 70-73. Providing specific details of a general claim does not create a separate and distinct cause of action. See Dlugash v. South Nassau Communities Hosp., 138 A.D.2d 343 (N.Y. App. Div. 1988) (affirming dismissal, on preclusion grounds, of plaintiff's allegations that defendants conspired to destroy his medical practice and ruin his reputation, in light of dismissal of prior action challenging defendant hospital's termination of plaintiff's hospital privileges).

Finally, although plaintiff did not allege obstruction of justice (in the form of evidentiary destruction and witness concealment) in her Lipin I complaint,[17] she had the

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[17] However, as noted above in note 14, plaintiff did raise such concerns at later stages of her state court litigation. See Brief for Plaintiff-Appellant, dated October 16, 1992, at 13-17; Brief for Plaintiff-Appellant, dated January 17, 1994, at 42-44, 73-80. To the extent that plaintiff's claims of evidentiary tampering and witness concealment could be deemed raised and unanimously dismissed in state court, see Lipin v. Bender, 644 N.E.2d at 1305 ("Plaintiff's remaining contentions are without

opportunity to do so. A final adjudication on the merits precludes not only claims that were raised in an earlier proceeding, but also those transactionally related claims that could have been raised. See Allen, 449 U.S. at 94 (citing Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)); Smith, 429 N.E.2d at 750 (precluding claim that could have been litigated in earlier action).

Plaintiff admits to having learned of the destruction of certain documents in her Red Cross employee file as early as March 8, 1990, the day after she received defendants' Verified Responses; she acknowledges having become fully aware of "the retaliatory and discriminatory destruction and obfuscation of her files and records" on April 15, 1991. See Lipin III Compl. ¶¶ 68, 124-28. Given this knowledge, Lipin accordingly could have attempted to amend or supplement her August 12, 1989 state-court complaint. New York CPLR 3025(a) would have permitted Lipin to amend her complaint as a matter of course within twenty days of receipt of defendants' March 7, 1990, Verified Responses. See, e.g., Carp v. Marcus, 105 A.D.2d 584, 585 (N.Y. App. Div. 1984). If, at that time, Lipin did not yet have sufficient information with which to amend her complaint, CPLR 3025(b) would have allowed her to obtain leave of the Court to amend or supplement the complaint. Absent prejudice or surprise, such leave would most likely have been "freely given." See McCaskey, Davies & Assocs. v. New York City Health & Hosps. Corp., 450 N.E.2d

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merit."); Lipin v. Bender, 193 A.D.2d at 428 ("We have considered plaintiff's other points and find them without merit. . . . Her attempt to portray the defendants as having engaged in dilatory and sharp practices appears to have but one purpose -- to obscure the issue of her own misconduct."), the claim could be directly precluded in this Court.

240, (N.Y. 1983); Fahey v. County of Ontario, 380 N.E.2d 146 (N.Y. 1978).

Thus, because plaintiff's obstruction of justice allegations arise from the same purported misconduct as the claims in Lipin I, and because she could have included them in that action, plaintiff is precluded from raising an evidentiary destruction and obfuscation claim in this Court.

c. Defamation and Blacklisting Claims

Plaintiff's Lipin II allegations of defamation and blacklisting -- also elements of her overarching retaliatory conspiracy theory -- are nearly identical to the defamation and blacklisting claims asserted in state court. In her state action, plaintiff alleged that, as a result of her complaints of sexual harassment and discrimination, defendant Bender and others "engaged in a conspiracy and campaign to stigmatize, vilify, and . . . defame her, ruining her reputation and making it impossible for her to secure other employment." Lipin I Compl. ¶ 58. Specifically, plaintiff alleged that Bender openly questioned her knowledge of marketing and her supervisory skills, that he falsely stated to others that it was plaintiff who had made sexual advances to him, and that he published and disseminated these statements. Id. ¶¶ 59-63.

In Lipin II, plaintiff reasserts, verbatim, these allegations. See Lipin II Compl. ¶¶ 260-66. Beyond that, plaintiff does no more than incorporate additional defendants into the blacklisting conspiracy theory set forth in Lipin I. See id. ¶¶ 266-72.

Because such new factual allegations do not create a separate claim unrelated to those stated in Lipin I, see Smith, 429 N.E.2d at 749, the defamation and blacklisting claims in

Lipin II are precluded.

d. Intentional Infliction of Emotional Distress Claim

In Lipin II, plaintiff states a claim for intentional infliction of emotional distress ("IIED") arising out of her allegations of defamation and blacklisting. Lipin II Compl. ¶¶ 276-277. Because this is merely an alternate theory of relief based on the transactionally related, if not identical, allegations of defamation and blacklisting asserted in Lipin I, the Lipin II IIED claim is precluded.

e. Breach of Contract and Quantum Meruit/Unjust Enrichment Claims

In Lipin I, plaintiff alleged that at the time of her employment it was understood and agreed in writing that defendants would not engage in sexual discrimination or harassment. Lipin I Compl. ¶ 51. In addition, plaintiff alleged that this agreement provided that employees were hired for their "work life expectancy;" that an employee would not be terminated unless he or she performed unsatisfactorily or violated ARCGNY regulations; that proper review would precede any such termination; and that corrective action, rather than termination, would be taken whenever possible. Id. ¶ 53.

In her Lipin II complaint, plaintiff restates word for word each of these allegations. See Lipin II Compl. ¶¶ 245, 247.

Beyond that, plaintiff does no more in her Lipin II complaint than flesh out the specifics of these claims by attempting to incorporate certain Red Cross policies and procedures into

plaintiff's employment contract. See id. ¶¶ 248-254. Therefore, we find that plaintiff's breach of contract claim in Lipin II is precluded.

In Lipin III, plaintiff seeks compensation, on grounds of quantum meruit and unjust enrichment, for the "innovative systems and health programs" that she invented, created and developed. Lipin III Compl. ¶ 172. Plaintiff alleges that, as consideration for this work, Red Cross promised her compensation beyond that which she received for her administrative functions. Id. ¶ 178. To the extent that these claims are independent of plaintiff's termination (being based on promises and performance prior to the termination), they can be distinguished from the breach of contract claim. Nonetheless, the quantum meruit/unjust enrichment claims do not withstand preclusion, for they are transactionally related to the Lipin I breach of contract claim and were available to plaintiff during her state-court litigation.

First, we find that plaintiff's state-court breach of contract claim and her federal-court quantum meruit and unjust enrichment claims are transactionally related, for they undoubtedly form a "convenient trial unit" in conformance with "the parties' expectations." Smith, 429 N.E.2d at 749. The quantum meruit/unjust enrichment claims, like the breach of contract claim, are based upon plaintiff's employment contract; both claims require interpretation of the terms and scope of that contract.[18] Second, especially when plaintiff could have

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[18] Although quantum meruit and unjust enrichment are quasi-contractual claims, their adjudication in this instance would require investigation into whether the compensation plaintiff received under her employment contract was intended as consideration for the performance for which plaintiff now seeks quasi-contractual remuneration.

joined the quantum meruit/unjust enrichment claims to her state-court complaint, to recognize these claims in federal court would be to countenance duplicitous litigation. Therefore, we find that the prejudiced dismissal of plaintiff's breach of contract claim in Lipin I precludes our consideration of her transactionally related Lipin III quantum meruit/unjust enrichment claims.

In sum, each and every claim in Lipin II and Lipin III is either a restatement, reformulation or elaboration of a transactionally related claim made by plaintiff in state court. Plaintiff cannot evade the rulings of the state courts by cloaking her claims in different theories. See Smith, 429 N.E.2d at 749. The doctrine of preclusion is intended to "relieve parties of the cost and vexation of multiple lawsuits" and "conserve judicial resources." Allen, 449 U.S. at 94. In order to realize this goal to the extent possible at this stage, we grant defendants' Rule 12(b)(6) motion to dismiss. To do otherwise would be contrary to the law; would condone excessive and frivolous litigation; and would allow plaintiff to circumvent the rulings, intentions, and authority of the state courts.[19]

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[19] Additionally, the Court notes that the substance of plaintiff's federal complaints reflects her access to the purloined documents. See Transcript of Proceedings, dated July 7, 1992, at 24; Transcript of Proceedings, dated October 29, 1992, at 12, 25; Transcript of Proceedings, dated December 3, 1992, at 18; see also Lipin II Compl. ¶¶ 152, 189, 267. Earlier in these proceedings, we observed that, to the extent that the allegations in plaintiff's federal complaints (particularly those pertaining to the details and scope of plaintiff's conspiracy theory) may have been based on knowledge gleaned from the purloined documents, the federal complaints may constitute, in and of

Because we dispose of these motions on grounds of claim preclusion, we do not address defendants' alternative issue preclusion arguments.

3. Plaintiff's Cross-Motions

For the following reasons, we deny plaintiff's cross-motions for adjournment and other relief.

First, we disagree with plaintiff that we must convert defendants' Rule 12(b) (6) motions into motions for summary

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themselves, violations of the New York Supreme Court's order suppressing the use of information contained in those documents. See Transcript of Proceedings, dated October 29, 1992, at 14, 25.

Accordingly, we suggested to plaintiff the prudence of filing a "sanitized" amended complaint -- that is, a complaint which did not incorporate information contained in the purloined documents -- with the hope of focussing on the merits of plaintiff's underlying sexual harassment and wrongful termination claims. See Transcript of Proceedings, dated December 3, 1992, at 15. We now note, however, that New York preclusion law forecloses this option due to the finality of Justice Schoenfeld's dismissal with prejudice of plaintiff's state action.

Although the question of whether the federal complaints violate Justice Schoenfeld's permanent suppression order has not been resolved, we do not attempt to treat that issue here.

judgment.[20] Although defendants buttress their 12(b) (6) motions with documents beyond the pleadings, those documents are contained in the record in Lipin I. It is well established that a federal court may consider records in prior judicial proceedings when determining a 12(b) (6) motion to dismiss, without the necessity of converting the motion into one for summary judgment. See, e.g., Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991).

Second, we deny plaintiff's request for an adjournment pursuant to Rule 56(f).[21] In light of the New York Appellate Division's conclusive determination that Justice Moskowitz's Dismissal Order was with prejudice, plaintiff can no longer contend that she lacks facts essential to her opposition of defendants' motions to dismiss.

Finally, we find that consideration of plaintiff's cross-motions to disqualify defendants' attorneys is irrelevant

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[20] Rule 12(b) provides in relevant part: "If, on a [12(b) (6)] motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

[21] Rule 56(f) states: "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present affidavit facts essential to justify the party's opposition, the court . . . may order a continuance to permit [the party to obtain such facts]."

to our determination of defendants' motions to dismiss.

All other contentions in plaintiff's cross-motions are either moot in view of the foregoing or without merit.

Conclusion

For the foregoing reasons, the Court grants defendants' Rule 12(b) (6) motions to dismiss. Plaintiff's cross-motions are denied. Lipin II and Lipin III are dismissed, with prejudice, in their entirety as to all defendants.

SO ORDERED.

Dated: January 17, 1996
New York, New York

/s/

U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of July one thousand nine hundred and ninety-seven.

Lipin

Dkt No: 96-7195, 96-7193

v

American Nat'l Red

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Joan Carol Lipin.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By:

/s/

Arthur M. Heller
Administrative Attorney

UNITED STATES COURT OF APPEALS
FILED JULY 18, 1997
GEORGE LANGE III, CLERK
SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

-against-

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., JAMES T. BYRNE, JR., CARL DESCH, and BARBARA FLETCHER,

Defendants.

93 CIVIL 1334(LBS)

JUDGMENT

JOAN CAROL LIPIN,

Plaintiff,

-against-

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF,

Defendants.

92 CIVIL 4455(LBS)

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UNITED STATES DISTRICT COURT
FILED JAN 18, 1996
S.D. OF N.Y.

Defendants having moved, pursuant to F.R.Civ.P. 12(b)96), for dismissal of both actions on grounds of preclusion, plaintiff having cross-moved for adjournment and other relief, and the said motions having come before the Honorable LEONARD B. SAND, United States District Judge, and the Court thereafter on January 17, 1996, having rendered its opinion (#75970); denying plaintiff's cross-motions, and granting defendants' Rule 12(b) (6) motions to dismiss, and dismissing Lipin II and Lipin III, with prejudice, in their entirety as to all defendants, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiff's cross-motions be and they are hereby denied, and it is further,

ORDERED, that defendants' Rule 12(b) (6) motions to dismiss be and they are hereby granted, and it is further,

ORDERED, that Lipin II and Lipin III be and they are hereby dismissed, with prejudice, in their entirety as to all defendants, for the reasons stated in the Court's opinion, dated January 17, 1996.

DATED: New York, New York
January 18, 1996

/s/

Clerk

/s/

Deputy Clerk

MANDATE

SDNY/NYNY
93-CV-1334,
92-CV-4455,
Sand

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of May, one thousand nine hundred and ninety-seven.

PRESENT: HON. ELLSWORTH A.
VAN GRAAFEILAND,
HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,

Circuit Judges.

- -

JOAN CAROL LIPIN,

Plaintiff-Appellant,

-v.- No. 96-7195

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF,

Defendants-Appellees.

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JOAN CAROL LIPIN,

Plaintiff-Appellant,

-v.- No. 96-7193

AMERICAN RED CROSS IN GREATER NEW YORK; AMERICAN NATIONAL RED CROSS; ROBERT M. BENDER, JR.; JAMES T. BYRNE, JR.; CARL DESCH; BARBARA E. FLETCHER,

Defendants-Appellees.

- -

UNITED STATES COURT OF APPEALS
FILED MAY 22, 1997
GEORGE LANGE III, CLERK
SECOND CIRCUIT

ISSUED AS MANDATE. 7/25/97

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,	93 CIV. 1334 (SS)
Plaintiff,	AMENDED VERIFIED COMPLAINT
- against -	
AMERICAN RED CROSS IN GREATER NEW YORK, AMERICAN NATIONAL RED CROSS, ROBERT M. BENDER, JR., JAMES T. BYRNE, JR., CARL DESCH, and BARBARA E. FLETCHER,	PLAINTIFF DEMANDS TRIAL BY JURY
Defendants.	

Plaintiff, by her attorneys, WISEHART & KOCH, for her complaint against defendants, alleges and states:

Jurisdiction and Venue

1. Jurisdiction exists under 28 U.S.C. §§ 1331, 1343, 1349, and 1367, 42 U.S.C. §§ 1983 and 1985, 36 U.S.C. § 2, and under the doctrines of supplemental and pendent jurisdiction.

2. The amount in controversy herein exceeds the sum or value of $50,000.00, exclusive of interest and costs.

3. Venue exists pursuant to 28 U.S.C. § 1391 (b) and (e), in that the events or omissions giving rise to the claims pleaded herein occurred in the Southern District of New York.

4. Plaintiff Joan Carol Lipin is a female citizen of the United States and a resident of the State of New York, County of New York.

5. Plaintiff is by training and experience a professional administrator and manager in the field of health care services. She holds a Master's Degree in Business Administration with a concentration in Health Care Management.

6. Defendant American Red Cross in Greater New York ("New York Red Cross") is an integral and constituent unit of defendant American National Red Cross, an organization that operates as an instrumentality of the United States of America and the City and State of New York.

7. The American Red Cross is a membership corporation created by an Act of Congress and is subject to suit in this Court pursuant to 36 U.S.C. § 2.

8. Defendants New York Red Cross and American National Red Cross ("the Red Cross defendants") are organizations which act under color of law as instrumentalities and agents of the United States, the State of New York, and the City of New York.

9. The Red Cross defendants maintain offices at 150 Amsterdam Avenue, New York, New York 10023, and so maintained offices at all times material hereto.

10. Defendant Robert M. Bender, Jr., was and is the Manager or General Manager/Chief Executive Officer and Secretary of the New York Red Cross at all times material hereto.

11. Defendant Byrne is a member of the Board of Trustees of the New York Red Cross, Chairman of its Budget Committee, and Assistant Treasurer.

12. Defendant Desch is a member of the Board of Trustees of the New York Red Cross, a member of its Compensation Committee, and Treasurer.

13. Defendants Byrne and Desch have fiduciary duties and responsibilities with regard to the Red Cross defendants, their contributors and other sources of income, and to plaintiff as a former official of the New York Red Cross and a victim of the blatant violation of Red Cross policies and procedures by defendants Bender and Fletcher.

14. Further, by virtue of their official positions, defendants Byrne and Desch have fiduciary responsibilities to see to it that the properties, valuable documents, plans and records of the Red Cross defendants are preserved.

15. Defendants Byrne and Desch have discriminatory attitudes towards female and minority personnel.

16. Defendants Byrne and Desch are the members of the Board of Trustees of the New York Red Cross who were responsible for selecting defendant Bender in preference to better-qualified black candidates considered for the position of the Chief Executive Officer of the New York Red Cross.

17. Defendants Byrne and Desch were and are the powerbase of defendant Bender on the Board of Trustees of the New York Red Cross, together with Jesse Wolff, an attorney in the law firm of Weil, Gotshal & Manges, who is also a Trustee of the New York Red Cross.

18. Defendant Desch admitted to plaintiff that he had been aware of Bender's relationship with Fletcher since shortly after Fletcher was hired by Bender, but took no action with respect thereto.

19. Defendant Desch repeatedly sexually assaulted plaintiff in the offices of the New York Red Cross, and elsewhere.

20. Plaintiff complained of sexual harassment and opposed the discriminatory practices of defendant Bender to defendants Byrne and Desch.

21. However, defendants Byrne and Desch caused no investigation to be made regarding the complaints of plaintiff, and neither took any action whatsoever.

22. Defendants Bender, Byrne and Desch were well aware of plaintiff's intention to pursue her claims through legal proceedings should that become necessary.

23. On information and belief, defendants Byrne and Desch failed and refused to take any action with regard to defendants Bender and Fletcher, or to institute an investigation concerning the complaints of plaintiff because of their conflicts of interest arising out of their relationships with Bankers Trust Company and Citibank, the two main financial institutions in New York engaged in handling Red Cross funds and investments at a very great profit to such financial institutions.

24. On information and belief, Bankers Trust Company and Citibank divided between themselves the Legacy Fund investments of the New York Red Cross in excess of fifteen million dollars ($15,000,000.00).

25. On information and belief, Bankers Trust Company and Citibank also handle funds and investments for the American National Red Cross, on which they make a substantial profit.

26. Defendants Byrne and Desch knew that by concealing information concerning the mismanagement of the New York Red Cross as a result of the Bender/Fletcher relationship, and by failing to take any action concerning the complaints and objections of plaintiff, defendant Bender would continue to support the highly lucrative activities of Bankers Trust Company and Citibank in the handling of funds and investments for the Red Cross defendants.

27. The Red Cross is a disaster relief agency supported both by governmental funds and massive public contributions.

28. The New York Red Cross is a managerial cripple as a result of the misconduct of defendants.

29. As the Chief Executive Officer of the New York Red Cross, defendant Bender, who has stated on more that one occasion that he is a person who goes through life with "no sense of guilt," is a moral midget who mis-manages the New York Red Cross and dissipates its funds for his personal purposes and pleasures.

30. The existence of such a compromised managerial environment at the New York Red Cross seriously compromises the ability of the agency to perform its disaster relief services, and is contrary to the public interest.

31. Defendant Fletcher was the assistant of defendant Bender of the New York Red Cross at all times material hereto until her abrupt resignation or termination

effective June 5, 1990, when she became a fugitive aided and abetted by defendants from the deposition of her that had been scheduled and ordered to occur in New York two days later.

COUNT I

RETALIATORY SPOLIATION AND TORTIOUS INTERFERENCE

32. Plaintiff began to work at the New York Red Cross on or about January 6, 1986, as Assistant Manager of Health Services and as a senior executive of the New York Red Cross, one of four Executive Units of the Red Cross defendants.

33. Plaintiff performed her duties in an outstanding manner which at all times exceeded the requirements of the position.

34. On or about July 1, 1986, plaintiff's title was changed to Manager for Health Services.

35. Plaintiff acquitted herself in a superior manner and, in fact, performed far more than was required, and provided strategic marketing and planning guidance in substantial advancement of the purposes and objectives of the Red Cross.

36. Plaintiff also designed and implemented the first Board approved cost accounting system for the New York Red Cross with future program budgeting capabilities.

37. Defendant Bender was plaintiff's immediate supervisor.

38. Almost immediately after hiring plaintiff, defendant Bender, although married, began to pressure her to

indulge his peculiar sexual appetites.

39. Defendant Bender was motivated by an invidious and malicious discriminatory animus against plaintiff because she was a subordinate female employed in an executive position.

40. On information and belief, defendants were at all times aware of defendant Bender's invidious and malicious discriminatory animus, but did not discipline him, investigate reports of his misconduct or take any action to provide a remedy for his heinous practices.

41. Defendant Bender repeatedly propositioned plaintiff, and often engaged in devious attempts to force himself upon her, including in car rides home in which he insisted that she accompany him.

42. Defendant Bender, sexually assaulted plaintiff, repeatedly and offensively touched plaintiff, placed his hands on her thighs and groped crudely toward her private parts and his genitals.

43. Plaintiff rebuffed each and every one of defendant Bender's sexual advances, unequivocally saying "No" when defendant Bender, on or about the sixth week of her employment, said to plaintiff, "It's so easy to have a discreet affair, think about it."

44. Defendant Bender's behavior was repugnant, repulsive and unwelcome in her presence.

45. After plaintiff denied him his erotic release, defendant Bender's behavior toward plaintiff deteriorated further.

46. On a regular basis, defendant Bender accosted plaintiff in her office, and, while rubbing his genital area suggestively, said he wanted to discuss business.

47. Bender sought to excite plaintiff by describing a bizarre sexual exploit in which he had participated and showing her revolting pornographic materials.

48. On another occasion, defendant Bender burst into plaintiff's office and closed the door.

49. Red-faced and perspiring from apparent self-stimulation, defendant Bender so terrorized plaintiff by manipulating his penis in a threatening and sexually aggressive manner that she feared for her physical safety, having been psychologically raped by defendant Bender over an extended period of time.

50. Defendant Bender assigned plaintiff increasingly complex and voluminous assignments in the expectation that, unable to accomplish such assignments and fearing for her job, plaintiff would submit to his sexual demands.

51. Defendant Bender also tried to coerce and threaten plaintiff into taking improper and discriminatory action against a female black employee.

52. Defendants engaged in sexual discrimination against female executives throughout the organization. Female executives, including plaintiff, were treated by male executives, including defendant Bender and his predecessor, as playthings, turning Red Cross facilities into libidinal free-fire zones in which discarded and used condoms were left lying around the business offices.

53. Defendant Bender further retaliated and discriminated against plaintiff by denying and delaying her promotions and pay increases arbitrarily and, contrary to Red Cross policy, changing her employment anniversary date, purportedly placing her on probation without informing her, contrary to Red Cross policy, and arbitrarily and adversely redefining her job descriptions and functions.

54. Plaintiff complained often of defendant Bender's sexually harassing, obscene and discriminatory behavior, and spoke directly to Mary M. Stanton, Administrator and Manager of Human Resources, and to members of the Executive Board (Board of Trustees), peers, staff, and key volunteers, but without effect on defendant Bender's reprehensible behavior.

55. As defendant Bender's behavior became progressively more outrageous, plaintiff informed Stanton that she would probably file a sexual harassment suit against Bender and the Red Cross defendants.

56. On February 5, 1988, defendant Bender terminated plaintiff in retaliation for continuing to reject his sexual demands and then objecting to his discriminatory and repulsive behavior to other executives and Trustees of the New York Red Cross.

57. Defendant New York Red Cross was under the day-to-day control and direction of defendant Bender and maintained records and files in the ordinary course of business.

58. The maintenance and preservation of such records and files is required by law, American Red Cross policy, local internal procedural guidelines, and principles of good business practice.

59. Such records and files constituted assets and property of the Red Cross defendants of highly significant and important value, and showed that plaintiff had performed her duties and made contributions to the Red Cross defendants of outstanding significance.

60. Plaintiff also maintained such files as required by the Red Cross defendants and Bender in the ordinary course of business.

61. Plaintiff maintained additional records and files as she felt necessary or desirable to document and support the various and complex assignments given to her by defendant Bender.

62. Such additional records and files form a substantial portion of plaintiff's work product while employed by the Red Cross defendants, and contained plans and procedures developed by her having a value greatly exceeding her compensation.

63. Such documents as created and maintained documented plaintiff's work performance and contributions while at the New York Red Cross.

64. Defendants were aware that plaintiff had told Mary Stanton and others, including defendants Byrne and Desch, that it was likely that she would have to sue Bender and the Red Cross defendants.

65. Defendant Bender was aware that his termination of plaintiff in retaliation for openly accusing him of sexual harassment, continually refusing his sexual advances, and objecting to his discriminatory acts, was unlawful.

66. Fully cognizant of how vulnerable he and the New York Red Cross, which he had failed to manage competently and in a lawful manner free from hostile, oppressive and discriminatory practices, were to liability under civil rights laws, defendant Bender and his attorneys hatched a scheme to retaliate against plaintiff and deprive her of the tangible evidence and property she would need to prove her claim and discredit false or self-serving pretexts he might seek to create or cause or conspire to be generated by others.

67. In collusion with his assistant, defendant Fletcher, defendant Bender caused the records and files of plaintiff's outstanding achievements to be destroyed by defendant Fletcher, on or about February 8, 1988, the first business day after plaintiff was unlawfully terminated by defendant Bender.

68. Plaintiff first learned of the destruction of evidence upon receipt of the Verified Responses of defendants Bender and the New York Red Cross dated March 7, 1990, but did not know at that time that the person responsible for such obstruction of justice was defendant Fletcher.

69. Defendant Bender and the Red Cross defendants were aware that the documents would be needed for litigation since plaintiff had told Mary Stanton, Administrator and Manager for Human Resources, and others, including defendants Byrne and Desch, that defendant Bender had sexually harassed her and that she intended to sue the Red Cross. Plaintiff had also repeatedly told defendant Bender that his disgusting and discriminatory treatment of her and other employees was unacceptable and unlawful.

70. Following such deliberate spoliation of material evidence regarding the value of plaintiff's performance and contributions, plaintiff filed actions against the Red Cross

defendants and defendant Bender.

71. In her complaints, plaintiff alleged that she was sexually harassed and discriminated against by defendants Bender and the Red Cross defendants. Plaintiff further alleged that she was terminated unlawfully and in retaliation for refusing to submit to defendant Bender's sexual advances and for opposing his discriminatory practices and the hostile and discriminatory environment at the New York Red Cross.

72. Plaintiff also alleges that defendant Bender arbitrarily assigned her an unfair and increasingly complex and voluminous workload in retaliation against her, but that she was still able to perform her duties in an outstanding manner despite Bender's malicious and discriminatory purpose in assigning such difficult matters to her in furtherance of his practice of sexual harassment against plaintiff.

73. The malicious and outrageous pattern and usage of defendant Bender and the attorneys for the New York Red Cross in making impossible assignments was well known to defendants.

74. The health and career of Edward B. Talvy who established the EEO program at the New York Red Cross were destroyed by defendant Bender aided and abetted by Weil, Gotshal & Manges in furtherance of such a pattern or practice as was the career of William Lattimore, who formerly reported to plaintiff.

75. A crucial element in plaintiff's complaints against defendant Bender and the Red Cross defendants is that she was at all times qualified and capable of performing her duties as a senior executive of the Red Cross, and that she did in fact perform each and every duty assigned to her in a competent and satisfactory manner.

76. During her tenure at the New York Red Cross, plaintiff was the highest ranking female executive of the New York Red Cross and was twice appointed Acting General Manager at all times material hereto.

77. The work performance of plaintiff was fully documented and supported by records and files which she created and maintained in her office within the offices of defendant New York Red Cross but such records and files were destroyed or otherwise rendered worthless as evidence by defendants.

78. These records and files demonstrate that plaintiff was not only qualified to hold her position, but fulfilled her responsibilities as a senior executive of the Red Cross in an outstandingly competent and effective manner.

79. Plaintiff's records and files also indicate the arbitrary, unfair, and increasingly complex and voluminous assignments that defendant Bender assigned to her in retaliation for her opposition to his sexual harassment and acts of discrimination against her as described above, and that, despite the unfairness of these assignments, plaintiff was able to satisfactorily and competently complete each and every one.

80. At all times material hereto, defendants Bender, Fletcher and the New York Red Cross controlled the premises and offices containing plaintiff's records and files.

81. At all times material hereto, defendants Bender, Fletcher and the New York Red Cross were under a duty to maintain plaintiff's records and files, and not to destroy them or compromise their worth as property of the Red Cross or as to be evidence in litigation expected to be brought by plaintiff.

82. The Red Cross has a policy which mandates that all employees' files, and all material relating to existing or anticipated legal proceedings, be preserved and maintained.

83. It is the policy of the Red Cross defendants to preserve and not to destroy records and files relating to existing or anticipated legal proceedings.

84. At all times material hereto, defendants Bender, Fletcher and defendant New York Red Cross were aware that plaintiff's records and files were material evidence relating to existing or anticipated legal proceedings.

85. In violation of their duty and the express policies of the Red Cross defendants to preserve and maintain all material relating to existing or anticipated legal proceedings, and keep them separate from personnel files, defendants Bender and Fletcher plotted and schemed to destroy all contributions that plaintiff had made at the New York Red Cross.

86. Knowing that these documents would be sought as evidence in forthcoming litigation, defendants Bender and Fletcher set out to destroy the papers relevant to plaintiff's record of outstanding work performance.

87. On or about February 8, 1988, the first business day after plaintiff was terminated, defendant Fletcher took possession of plaintiff's records and files.

88. At this time, defendant Fletcher shredded and discarded approximately one half of plaintiff's work product through a paper shredder, effectively destroying half of the physical evidence plaintiff would later require to substantiate her claims against defendant Bender and the Red Cross defendants.

89. Defendant Fletcher admitted on April 15, 1991 that she had shredded, and destroyed by discarding approximately 50% of all papers maintained by plaintiff while employed by the Red Cross defendants, and that she had obstructed justice by destroying relevant evidence at a time when she, defendant Bender and defendant New York Red Cross, knew that plaintiff was likely to commence litigation.

90. Shortly after shredding and discarding approximately 50% of plaintiff's work product, defendant Fletcher designed a new filing system for the New York Red Cross, the Centralized Management Filing System.

91. The Centralized Management Filing System was so unwieldy that it had to be abandoned shortly after its implementation.

92. During the short duration during which the Centralized Management Filing System was extant, defendant Fletcher integrated and commingled all that remained of plaintiff's records and files into the bureaucratic morass which she, defendant Fletcher, had created.

93. As a result of incompetently commingling plaintiff's work product files with other files, and destroying documents identifying plaintiff as the person who initiated and developed such programs, strategic and marketing plans, policies and systems, defendant Bender and defendant New York Red Cross cannot now identify which of the documents in the files of the New York Red Cross relate to plaintiff's major accomplishments while she was there.

94. Defendant Fletcher willfully, deliberately and intentionally designed a filing system so complex, cumbersome and chaotic that it could not possibly function as a reasonable tool to preserve, maintain and locate key documents involving

the activities and programs of the New York Red Cross.

95. Upon information and belief, defendant Bender approved the design of defendant Fletcher's Centralized Management Filing System.

96. The remainder of plaintiff's work product was deliberately commingled and lost in a newly created filing system, the Centralized Management Filing System, also by defendant Fletcher.

97. Designed and implemented by defendant Fletcher, the new Centralized Management Filing System was so chaotic that it had to be abandoned shortly after implementation.

98. Only such a short time was needed to launder all of plaintiff's remaining records and files so as to cause them and plaintiff's identification with them to disappear in the Fletcher-designed filing system.

99. Because plaintiff's remaining work product was laundered by commingling it into the incompetently designed filing system, the New York Red Cross is unable to identify which of the documents had been prepared by plaintiff.

100. By willfully destroying documentary evidence upon which plaintiff would need to rely in proving her allegations and refuting defendants' defenses, defendants Bender, Fletcher and defendant New York Red Cross irreparably and substantially damaged plaintiff's case, and effectively denied her access to the physical evidence she needs to document her claims for relief.

101. Defendants' willful destruction and obfuscation of plaintiff's records and files was motivated by a desire to

prejudice the Courts in which plaintiff had filed claims against defendants and others against her, and prevent her from exercising and enforcing civil and human rights guaranteed by federal, state, and municipal laws.

102. Because of defendants' willful actions and tortious interference in depriving plaintiff of the evidence she needed to pursue her claims against defendants herein, and others, plaintiff is entitled to such relief as would have been available to her but for defendants' actions as described above.

103. Plaintiff demands such relief as she would have been entitled to in actions against defendants and others for sexual harassment, retaliation and other transgressions of her federal and civil rights, including compensatory and resulting damages in the amount of $5,440,630.00; additional damages for pain and suffering in the amount of $3,500,000.00; damages for injury to plaintiff's personal and professional reputation and good will associated therewith in the amount of $3,500,000.00; punitive damages in the amount of $5,000,000.00; and prejudgment interest and a reasonable allowance for attorney's fees, costs and litigation expenses; and such other relief as this Court deems just and proper.

104. Because of the willful, intentional, and deliberately malicious nature of defendants actions injuring plaintiff, additional punitive or exemplary damages are demanded in the amount of $7,000,000.00, or such other and further amount as shall be required, in light of defendants' income and assets, to deter defendants from engaging in such willful and reprehensible conduct in the future.

COUNT II

CONSTITUTIONAL TORT
42 U.S.C. § 1983

105. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 104 as though fully set forth herein.

106. Defendants acted under color of state and federal law to deprive plaintiff of her rights under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

107. Defendants acted under color of state and federal law to deprive plaintiff of her rights to enforce and seek redress of violations of her civil and constitutional rights by destroying and obfuscating evidence plaintiff needs to vindicate her civil rights in claims asserted against defendants and others, and by failing to reasonably safeguard plaintiff's records and files in anticipation of litigation, contrary to law and the established procedures of the Red Cross, and by retaliating against plaintiff for filing said claims and opposing defendants' unlawful practices.

108. On information and belief, such actions by defendants as described above were unlawful and have so prejudiced plaintiff's claims against them and others that it is impossible for her to obtain full vindication of her rights. Plaintiff demands in the amount of $17,440,630.00, or such amount to which she would have been entitled to but for defendants' unlawful and intentional deprivation of plaintiff's protected rights.

109. Defendants' willful misconduct and unlawful actions have caused and continue to cause plaintiff to suffer severe mental anguish, emotional stress, and pain and suffering, and damages in the amount of $7,000,000.00 are demanded.

110. Additional punitive or exemplary damages are demanded in such other and further amount as shall be required, in light of defendant's income and assets, to deter defendants from engaging in such willful and reprehensible conduct in the future.

111. Plaintiff also respectfully requests an allowance for reasonable attorney's fees, costs, and litigation expenses and such other and further relief as this Court deems just and proper.

COUNT III

CIVIL RIGHTS CONSPIRACY
42 U.S.C. § 1985(3)

112. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 111 as though fully set forth herein.

113. Defendants conspired to deprive plaintiff of the equal protection of the laws and of the equal privileges and immunities under the laws.

114. Defendants also conspired to disguise and conceal said conspiracy in further deprivation of plaintiff's rights.

115. Defendants Bender and Fletcher concluded that by destroying plaintiff's records and files, no physical evidence

would exist which proved the outstanding work performance of plaintiff while employed by the New York Red Cross.

116. Upon information and belief, defendants conspired to instruct defendant Fletcher to take possession of plaintiff's records and files and begin to destroy them.

117. Defendant Fletcher acted in furtherance of said conspiracy and destroyed by shredding or discarding approximately one-half of the documents from plaintiff's records and files.

118. Upon information and belief, defendants Bender and Fletcher at some later date conceived a scheme to scatter, camouflage, and conceal, and thereby effectively render worthless as evidence, the remainder of plaintiff's records and files.

119. Defendants' actions as described above were done with full knowledge and awareness that the records and files destroyed and obfuscated would be needed as evidence in litigation commenced to remedy violations of plaintiff's civil and constitutional rights, and for the sole purpose of retaliating against plaintiff and depriving plaintiff her rights.

120. Upon information and belief, defendants agreed to cover up and disguise defendant Fletcher's destruction and obfuscation of plaintiff's work products in furtherance of their conspiracy to engage in fraudulent concealment and tortious interference with plaintiff's rights and claims by aiding and abetting Barbara Fletcher in becoming a fugitive just when her deposition had been scheduled and ordered to occur.

121. Defendant Fletcher announced her resignation from the Red Cross and absconded from New York to California two days before her Court-ordered deposition was to

occur June 7, 1990.

122. Defendant Fletcher was aided and abetted in her flight to California by defendant Bender and his attorneys from Weil, Gotshal & Manges. At the time she left, Fletcher was still on the payroll of the Red Cross and subject to Bender's direct supervision and control.

123. Defendant Fletcher's flight was motivated solely by defendants' intention to engage in fraudulent concealment and to prevent plaintiff and plaintiff's attorneys from taking Fletcher's testimony relative to plaintiff's claims.

124. Plaintiff remained unaware of the destruction of her records and files concerning her work product at the Red Cross until Verified Responses from the Red Cross dated March 7, 1990, were received March 8, 1990. However, Fletcher's actions in furtherance of the scheme and conspiracy to obstruct justice by destroying evidence relevant to plaintiff's claims continued to be concealed, and were not disclosed therein.

125. Plaintiff was not aware of the retaliatory and discriminatory destruction and obfuscation of her files and records by shredding until April 15, 1991, when defendant Fletcher could be finally deposed after a lengthy investigation as to her whereabouts.

126. The obstruction of justice caused by the disappearance of Fletcher was aided and abetted by the Red Cross defendants who tampered with the evidence and submitted false statements under oath in order to conceal the whereabouts of Fletcher and make it impossible to trace her.

127. At Fletcher's deposition, plaintiff learned for the first time that defendant Fletcher herself shredded the documents relating to plaintiff's work performance.

128. During the course of that deposition, defendant Fletcher admitted that such obstruction of justice had occurred at a time when she, defendant Bender, and the Red Cross defendants were aware that plaintiff was likely to commence litigation.

129. The American National Red Cross was a co-conspirator that aided and abetted such obstruction of justice by concealing and obliterating key information needed by plaintiff in order to locate Fletcher, who had gone underground in California.

130. Defendants' conspiracy to obstruct justice in order to retaliate against plaintiff has continued to the present time, and they have failed to institute the remedial action that they are required by law to pursue against such unlawful activities after plaintiff had complained to defendants Byrne and Desch.

131. Under federal and state law, plaintiff has the right to commence legal actions to redress violations of her civil and human rights.

132. The actions of defendants as described above constitute tortious interference involving a conspiracy to deprive plaintiff of her civil rights and her rights to equal protection under the laws, or equal privileges and immunities under the laws, and plaintiff demands compensatory damages in the amount of $17,440,630.00.

133. Defendants' willful and deliberate actions have caused and continue to cause plaintiff severe mental anguish, emotional stress, and pain and suffering, and damages in the amount of $7,000,000.00 are demanded.

134. The actions of defendants described above constitute willful, wanton, and reckless disregard for plaintiff's rights, and punitive damages are demanded in the amount of $17,440,630.00.

135. Because the actions of defendants described above were motivated by a malicious and invidious discriminatory animus against her as a woman, and were taken in retaliation against her for asserting her rights and to disguise and conceal defendants' willful and unlawful actions, and describe a pattern of abuse and contempt for the laws, plaintiff requests damages in such other and further amount as shall be required, considering defendants' income and assets, intransigence, and failure to take remedial action on a timely basis when demanded, to deter defendants from engaging in such willful and reprehensible conduct in the future.

136. Plaintiff also respectfully requests an allowance for reasonable attorney's fees, costs, and litigation expenses and such other and further relief as this Court deems just and proper.

COUNT IV

WASTE, INJURY TO AND SPOLIATION OF PROPERTY

137. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 136 above as if fully set forth herein.

138. As a wrongfully terminated official of the New York Red Cross, plaintiff makes this claim against defendants for damages for waste, injury to, and spoliation of property in the form of the records, programs, contributions, and developments that plaintiff contributed to the Red Cross

defendants while she was employed by them.

139. Plaintiff also asserts this claim against the individual defendants on behalf of the Red Cross, a corporation.

140. Plaintiff has previously requested that the Red Cross terminate defendant Bender because of his malfeasance and willful misconduct in office.

141. Further demands by plaintiff that the Board of Trustees of the New York Red Cross take remedial action against defendants Bender and Fletcher and commence appropriate proceedings for the obstruction of justice, deliberate destruction of evidence, records and properties of substantial value and the victimization of plaintiff by acts of retaliation, sexual harassment and discrimination would be futile.

142. Such actions by defendants were part and parcel of a continuing conspiracy to retaliate against plaintiff for objecting to defendants' wrongful and discriminatory conduct and acts of sexual harassment.

143. Said acts by defendants also were designed to obstruct justice by eliminating evidence that defendants Bender and Fletcher had sabotaged and irreversibly injured the budgeting and accounting programs that the Board of Trustees of the New York Red Cross had mandated.

144. In early 1986, plaintiff had developed, at defendant Bender's request, a budgeting process for the New York Red Cross as well as a programmatic budget procedure.

145. The Board of Trustees of the New York Red Cross, including specifically defendants Byrne and Desch, approved, adopted, and mandated compliance with the budgeting process that plaintiff had developed.

146. Plaintiff had developed the budgeting program and process which she implemented in conjunction with a female employee, Ellen Rosten.

147. After the budgeting process had been adopted, Ellen Rosten informed plaintiff that she would seek to be promoted to the position of Chief Fiscal Officer, which was then vacate.

148. Defendant Bender refused to promote Rosten, telling plaintiff that he would only hire a man for the position.

149. The Board of Trustees of defendant New York Red Cross mandated implementation of the cost accounting system that plaintiff had designed, and implemented in conjunction with Ellen Rosten, which had been specifically approved by the Budget Committee, headed by defendant Byrne.

150. After defendant Bender hired a man, who had no background in non-profit accounting or financial matters, to become Chief Fiscal Officer, Ellen Rosten left the Red Cross.

151. At that point, the financial and accounting functions at the Red Cross was seriously compromised through lack of adequate personnel and resources.

152. At about the same time, Bender hired Fletcher and almost immediately commenced an open and notorious personal relationship with her, as he had attempted to do with plaintiff.

153. Bender involved Fletcher in the budgeting process, despite her lack of any suitable qualifications or experience therefor, and Bender and Fletcher ordered the Chief Fiscal Officer, purportedly pursuant to directions of defendant

Byrne, to implement a programmatic budget, having full knowledge that the staff and personnel of the New York Red Cross were not qualified or adequate to engage in such function on a broad scale basis.

154. The effect of such order was to cause the degradation and collapse of the accounting function of the New York Red Cross. Double sets of books of inconsistent accounting records created chaos, inability to account for and loss of funds.

155. In order to conceal their own complicity in this collapse of the accounting and budgeting process, defendants Bender, Fletcher and Byrne conspired to terminate the Chief Fiscal Officer who had been hired by the New York Red Cross, and to destroy the documents previously prepared by plaintiff relating to the proper performance of the cost accounting function and system.

156. The retaliatory termination of plaintiff by defendant Bender was action also taken to conceal the destruction of the cost accounting process that had been designed by plaintiff, the failure of the programmatic budgeting process which was intended to be a part of that program, and the degradation and collapse of the accounting function of the New York Red Cross as a consequence.

157. In implementation of the conspiracy to conceal and destroy evidence of the waste or injury to the property of the New York Red Cross and the spoliation of documents relating to the performance of the accounting function that had been mandated by the Board of Trustees, defendants Bender and Fletcher conspired with defendant Byrne to terminate plaintiff and to destroy the records relating to their own malfeasance and misfeasance, as alleged above, and to block any investigation or remedial action by the Trustees of the New

York Red Cross regarding the unlawful misconduct of defendant Bender involving plaintiff, who had made specific requests and demands for such action of defendants Byrne and Desch.

158. Said defendants also caused the destruction of the documentation and records referring to the innovative Marketing Plan created and developed by plaintiff for the Red Cross defendants in order to conceal and destroy evidence of defendant Bender's incompetence and tortious interference with respect to the implementation of said Marketing Plan.

159. On information and belief, said action was taken pursuant to the knowledge and approval of defendants Byrne and Desch, who were aware of plaintiff's complaints relating to sexual harassment by defendant Bender, and her objections to the impropriety of the Bender/Fletcher relationship.

160. When plaintiff objected to defendant Desch about the adverse consequences of the Bender/Fletcher relationship upon the management, programs and procedures of the Red Cross, defendant admitted that he had been aware of the nature of that relationship since shortly after Bender hired Fletcher in 1987.

161. However, in violation of his fiduciary duties as a Trustee of the Red Cross, defendant Desch failed and refused to take any action to remedy the adverse consequences of the Bender/Fletcher relationship upon the administration of the Red Cross, and to prevent the spreading waste to programs, properties, costs and expenses, and missions of the Red Cross resulting therefrom.

162. Plaintiff therefore claims damages on her own account and on behalf of the Red Cross as a corporation against defendants Byrne, Desch, Bender and Fletcher to recover

damages for waste, injury to and spoliation of property, assets, and valuable programs and systems belonging to the Red Cross, and needed by the Red Cross for the proper performance of its Disaster relief and health services functions.

COUNT V

RETALIATION UNDER THE HUMAN RIGHTS LAW OF THE STATE OF NEW YORK

163. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 162 above as if fully set forth herein.

164. Defendants aided, abetted, incited, compelled and coerced the doing of the acts alleged above in retaliation for the claims of sexual harassment, sexual discrimination, and other discriminatory acts, plaintiff made and are jointly and severally liable therefore pursuant to Section 296 ¶ 6 of the Executive Law (Human Rights Law) of the State of New York.

165. Defendants have committed discriminatory practices against plaintiff to retaliate or discriminate against plaintiff because she has opposed such practices that are made unlawfully thereunder in violation of Section 296 ¶ 7 thereof.

166. Plaintiff claims damages in the amounts stated hereinabove.

COUNT VI

RETALIATION UNDER THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

167. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 166 above as if fully set

forth herein.

168. Defendants aided, abetted, incited, compelled and coerced the doing of the acts alleged above in retaliation for the claims of sexual harassment, sexual discrimination, and other discriminatory practices plaintiff made and are jointly and severally liable therefore pursuant to Section 8-107(7) of the Administrative Code of the City of New York.

169. Defendants have committed unlawful discriminatory practices against plaintiff as alleged above to retaliate or discriminate against plaintiff because she has opposed such practices that are made thereunder.

170. Plaintiff claims damages therefor pursuant to Section 8-107(7) of the Administrative Code of the City of New York.

COUNT VII

QUANTUM MERUIT AND UNJUST ENRICHMENT

171. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 170 above as if fully set forth herein.

172. The Red Cross defendants requested that plaintiff invent, create and develop innovative systems and health programs, for its benefit including, without limitation:

(a) The first Board-approved and implemented cost accounting system and proposed program budgeting process for the New York Red Cross;

(b) The Reconfiguration Model for Health Services and Marketing including Health Education, Safety Training and Injury Prevention, Community Health Programs, and Community Outreach (Hispanic) Departments, design, development and implementation of new AIDS education and prevention programs, and preliminary design of an AIDS model education program for New York State Parolees in conjunction with the New York State Parole System;

(c) New health education, safety training and injury prevention, community health, and community outreach programs;

(d) The development of contract and grant proposals for new programs which resulted in the securing of the largest total amount in grants and contracts for the Health Services and Marketing Division of the New York Red Cross to that time;

(e) The design and development of Strategic Initiatives programs for the New York Red Cross as approved by the Executive Board;

(f) The Strategic Marketing Plan for the New York Red Cross;

(g) The Strategic Planning Process for the New York Red Cross;

(h) The first International Public Health Conferences with the Swedish Public Health Council of Stockholm and Gothenberg Sweden

and the New York Red Cross;

(i) The Incentive Compensation Program for the newly established Marketing Department with team incentive formulas;

(j) The Executive Health Services Working Volunteer Committee procedure and the Executive Marketing Working Volunteer Committee;

(k) The first Strategic Planning goals and objectives for the New York Red Cross;

(l) The Volunteer and Training position and program for the New York Red Cross;

(m) The operational and organizational policies and procedures for the New York Red Cross;

(n) The creation of job descriptions for seventy positions designed and developed to reflect long term strategic goals and objectives and professional development for the New York Red Cross;

(o) The initiation of joint inter-agency discussions for health programs with New York City Health Department and the New York Business Group on Health;

(p) The first Task Force for the Code of Conduct and Intellectual Property Document for Safety Trainers and Safety Instructors for the New York Red Cross;

(q) The Task Force to Evaluate the Regional Sales Territory with Contiguous Chapters to Determine Uniform Pricing.

173. As requested, plaintiff did invent, create and develop such accounting, financial, budgeting, strategic marketing and planning initiatives, health programs, policies and procedures for the benefit of the Red Cross defendants.

174. No part of the compensation received by plaintiff reflected the value of such new systems, programs and intellectual properties invented, created, initiated and/or developed by plaintiff.

175. At the time plaintiff invented, created and developed such accounting, financial, budgeting, marketing and strategic planning goals and objectives, health programs, policies and procedures plaintiff's compensation was based exclusively upon her administrative functions and did not include any remuneration for the invention, creation and development of accounting, financial, budgeting, marketing and strategic planning systems and health services programs.

176. At the time that plaintiff was with the New York Red Cross, no other executive participated in the invention, creation or development of any significant systems or programs for the Red Cross.

177. On the contrary, other executives including defendants Bender and his assistant Fletcher were responsible for the debilitation and destruction of systems and programs that had been installed for the protection of the Red Cross and actions in furtherance of its objectives and missions.

178. The Red Cross repeatedly promised and assured plaintiff that she would receive additional compensation for the

invention, creation and development of accounting, financial, budgeting, marketing and strategic planning systems, health services and programs, policies and procedures utilized by the Red Cross for its benefit, but no such compensation has been received by plaintiff.

179. The Red Cross adopted policies and procedures to encourage the initiation and development of such systems and programs in order to "stimulate all Red Cross personnel to seek new horizons of creativity and to fuel our unified drive towards excellence."

180. As part of its program to encourage the development of such intellectual properties, the Red Cross explicitly mandated appropriate recognition and incentive compensation for the creators of productive accomplishment.

181. In the alternative, the termination of plaintiff by the defendants constituted an anticipatory breach of plaintiff's contract of employment making plaintiff's further performance or receipt of further compensation as anticipated impossible or substantially impossible.

182. Said termination of plaintiff also resulted in a failure of consideration on the part of plaintiff in inventing, creating and/or developing such new programs, systems and procedures, leaving plaintiff with a proprietary interest therein.

183. Plaintiff has been injured by not receiving the fair value of her services, inventions and programs created by her as stated above, and defendant Red Cross has been unjustly enriched by receiving the benefits of the systems and programs developed by plaintiff pursuant to its requests. The reasonable value of plaintiff's claim therefor is $5,000,000.00, or such further and additional amount as shall be proved at trial.

WHEREFORE, (I) plaintiff demands judgment against defendants, jointly and severally, for damages as set forth below, or for such other and further amounts as shall be proved at trial:

(a) Compensatory and resulting damages in the amount of $17,440,630.00;

(b) Additional damages in the amount of $7,000,000.00 for severe and continuing mental anguish, emotional stress, and pain and suffering;

(c) $5,000,000.00 for unjust enrichment of the Red Cross defendants by the quantum meruit value of the ideas, plans, services and programs created, initiated and developed by plaintiff; and

(d) Punitive damages in the amount of $17,440,630.00; and

(II) Plaintiff demands judgment against defendants Byrne and Desch providing redress for the breaches of their fiduciary duties as Red Cross Trustees causing injury to the properties, plans, programs, and mission of the Red Cross and requiring them to take remedial action to rectify the unlawful acts and misconduct of defendant Bender, together with prejudgment interest, and reasonable allowances for plaintiff's attorney's fees, costs and litigation expenses, and such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
March 12, 1993

WISEHART & KOCH

/s/

By:_____
Arthur M. Wisehart (AMW 4003)

25 West 43rd Street
Suite 1114
New York, New York 10036
(212) 730-0044
Attorney for Plaintiff

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

I am the Plaintiff in the within action; I have read the foregoing amended verified complaint and know the contents thereof; the same is true to my own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

/s/

Joan Carol Lipin

Sworn to before me this

12th day of March, 1993:

/s/

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

- against -

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF,

Defendants.

92 Civ. 4455 (LBS)

AFFIDAVIT OF JOAN CAROL LIPIN IN SUPPORT OF CROSS-MOTION TO ADJOURN, AND OTHER RELIEF

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action.

2. This affidavit is respectfully submitted in support of my cross-motion to adjourn, and other relief, in connection with defendants' motion to dismiss dated February 9, 1995.

3. This affidavit is made upon the basis of personal knowledge.

4. Defendants' motion to dismiss relies principally upon the Decision and Order of New York Supreme Court Justice Martin Schoenfeld, dated August 18, 1994 (Baer Aff.; Exh. P), and the purported judgment rendered thereon (Baer Aff.; Exh. B).

5. The New York decision is crucial to defendants' motion, yet it is subject to likely reversal in appeals currently pending in the New York Appellate Division, First Department.

6. My Notice of Appeal (Exhibit A annexed hereto) and the Brief that I filed on March 10, 1995 (Exhibit B annexed hereto), perfect the appeal with reference to the Schoenfeld Decision and Order. The Brief shows good cause to support the conclusion that the Schoenfeld decision will be reversed.

7. The affidavit of Lawrence J. Baer, an attorney, submitted with defendants' motion, fails to disclose the existence or status of the pending appeals.

8. The Baer affidavit sworn to February 9, 1995 therefore was submitted in bad faith with intent to deceive the Court in violation of Section 487 of the New York Judiciary Law and 28 U.S.C. § 1927.

9. Other relevant papers that Mr. Baer failed to include with his affidavit are (a) the Decision and Order of the Court of Appeals entered September 27, 1994, which denied defendants' motion to consolidate or "subsume" the Order of Dismissal of Justice Moskowitz of January 9, 1992, into the Schoenfeld decision dated August 18, 1994 (Exhibit C annexed hereto), (b) defendants' Notice of Motion dated September 2, 1994 with respect thereto (Exhibit D annexed hereto), and (c) my papers dated October 17, 1994, in opposition to defendants' motion to dismiss or consolidate and to adjourn my pending

appeal in the Appellate Division, First Department, from the Order of Justice Moskowitz dated August 6, 1992, and the Order of Justice Ciparick dated December 28, 1992, pending the determination by the Court of Appeals, that had been perfected on July 21, 1993 (Exhibit E annexed hereto).

10. Also missing from the Baer affidavit is the Official Transcript of oral argument before Justice Moskowitz on July 23, 1992 incorporated by reference herein. Such transcript is documentary evidence that the statements made by Justice Moskowitz on August 6, 1992 (Baer Aff.; Exh. N, pp. 6-7) when she granted my motion to recuse herself for bias and prejudice are not true and were made by her to deliberately inject further prejudice into my State Court action.

11. Finally, the current pendency of my appeal to the Appellate Division, First Department, with reference to the Decisions of Justice Ciparick and Justice Moskowitz in this matter, which contradict and render nugatory the Schoenfeld Decision, are not referred to in the Baer affidavit.

12. As shown in Exhibit E, the Brief perfecting my timely appeal of the Order of Justice Ciparick is dated July 21, 1993. (Exh. K.)

13. Defendants were ordered by the Appellate Division entered by an Order June 2, 1994, to file their answering brief to such pending appeal from the Order of Justice Ciparick on or before November 2, 1994. (Exhibit F annexed hereto.) However, defendants have defaulted in filing their answering brief in the appeal and the Orders appealed from therefore are subject to reversal.

14. The Pre-Argument Statements for each of the two appeals currently pending listing the issues involved are annexed hereto as Exhibits A, G & H.

15. Accordingly, defendants' motion to dismiss should be adjourned, pursuant to Fed.R.Civ.P. 56(f) until a reasonable time after a final decision has been rendered by the Appellate Division, First Department in connection with the pending appeals cited above because facts essential to complete my opposition to defendants' motion are not presently available.

16. The Court of Appeals in its Order entered November 1, 1994 (Baer Aff. Exh. C), affirmed only the Order of the Appellate Division entered May 11, 1993 (Baer Aff. Exh. F) that unanimously affirmed the Dismissal Order of Justice Moskowitz of January 9, 1992 and did not affect the subsequent proceedings.

17. As shown in my Brief dated March 10, 1995, filed in the Appellate Division, First Department, the Moskowitz dismissal was not on a "with prejudice" basis and such Order of Dismissal is not subject to the subsequent alteration represented by the Schoenfeld decision. (Exhibit B.)

18. Since the State Court action was a dismissal without prejudice, it does not preclude the litigation in 92 Civ. 4455 (LBS) or 93 Civ. 1334 (LBS). Under New York CPLR 5013 and § 205, the actions commenced by me in this Court were specifically authorized.

19. The Dismissal Order of Justice Moskowitz of January 9, 1992, which was written out by hand in the presence of counsel for respondents and had their approval as to the terminology used, states in its entirety (Baer Aff. Exh. A):

> "Upon the foregoing papers it is ordered that this motion is granted pursuant to decision on record incorporated by reference into this Order."

"Clerk directed to enter judgment dismissing complaint as to all defendants pursuant to this Order." (Emphasis added.)

20. Respondents did not appeal or cross-appeal the terminology used in said Order of dismissal by Justice Moskowitz.

21. Furthermore, although the Baer affidavit sworn to February 9, 1995, states at paragraph 1 that the Exhibits are "true and correct copies of the filed documents listed below," missing from Exh. A of the Baer affidavit is the handwritten Ancillary Order of Dismissal of Justice Moskowitz of January 9, 1992, approved by and inclusive of defendants' counsel's wording set forth therein by Lawrence Baer, named co-defendant in 92 Civ. 4455(LBS). Such Ancillary Order of Justice Moskowitz dated January 9, 1992, is annexed hereto as Exhibit I.

22. Further, the adjournment requested should be granted because the State Court decision and judgment relied upon by defendants were procured on the basis of (a) fraud, (b) the use of false affidavits by the attorneys involved in obtaining it, and (c) in furtherance of a conspiracy, to which those same attorneys were parties, (i) to obstruct justice and deprive me of my civil and constitutional rights, in violation of 42 U.S.C. §§ 1983, 1985(3), 1988, and 28 U.S.C. § 1927, (ii) to deprive me of depriving me of freedom of speech and access to the courts in order to prevent me from obtaining a remedy for the civil rights violations including repeated acts of sexual harassment and discrimination and retaliation perpetrated against me by defendants, and (iii) to deprive me of my constitutional Federal rights to raise objections to and redress for such conduct, and (iv) for the purpose of injuring me and depriving me as a victim of sexual harassment and discrimination perpetrated in

the workplace by an instrumentality of the United States from having and exercising my rights as a citizen of the United States, including my rights to be protected from and have a remedy for repeated acts of defendants aided and abetted by their counsel which constitute badges or incidence of slavery prohibited by the Thirteenth Amendment of the Constitution of the United States, included repeated acts of sexual harassment, discrimination, and insulting, demeaning, humiliating and defamatory treatment which I experienced and to object thereto and demand a remedy therefore, and have access to the courts for such purposes, in accordance with my rights pursuant to 42 U.S.C. §§ 1983, 1985(3) and 1986, and 28 U.S.C. § 1927.

23. The false affidavits referred to, those of Lawrence J. Baer and Mark A. Jacoby sworn to July 3, 1991, and that of Mark A. Jacoby sworn to July 7, 1992, were known to be false when the affidavits were sworn to on a "personal knowledge," as shown to be false on the basis of my personal knowledge in my affidavit in 92 Civ. 4455 (LBS) sworn to October 6, 1992 (¶¶ 57-159), and my affidavit in 93 Civ. 1334 (LBS) sworn to June 17, 1993 (¶¶ 23-35) each of which are incorporated by reference herein.

24. Defendants Baer and Jacoby in 92 Civ. 4455 (LBS) filed the above mentioned affidavits to deceive and mislead the Courts in furtherance of the entrapment conspiracy referred to herein.

25. Other acts committed by co-defendant Baer and others in furtherance of said conspiracy include the placement of the entrapment papers, on June 28, 1991, in an open, and unsealed conditioned available and intended for examination by me, at the conference table where it was known that I would be sitting, directly across from and in full view of attorney Baer and two other counsel for defendants.

26. Attorney Baer made the incredible and false contention that notwithstanding such a bulky pile of documents that he had brought with him to the place of the conference before the Special Referee, and had admittedly removed them from his briefcase, he did not know that they were missing even four days after the event had occurred.

27. Mr. Baer and his legal colleagues who were present are persons known to be anything but careless, and the only plausible explanation for what occurred is they intended to victimize me by perpetrating an entrapment conspiracy to create prejudice against me and prevent me from having access to the New York courts to object to and redress the acts of sexual harassment and discrimination perpetuated against me.

28. Defendants' urgent need for such a diversionary tactic stemmed from the recent revelation of information seriously implicating defendants in connection with discovery being conducted in the pending underlying litigation.

29. Such discovery included the disclosure, in a deposition of former Red Cross employee Barbara Fletcher, in California, and named co-defendant in 93 Civ. 1334 (LBS) exposing extensive spoliation of and tampering with evidence by defendants in connection with my work performance as an executive of the Red Cross.

30. Fletcher was the former female assistant of defendant Bender, with whom Bender's open and notorious relationship was a top conversation topic among the staff of the Red Cross to the effect that she would do whatever he required her to do as his female lackey or slave.

31. The nature of the Bender/Fletcher relationship was exposed by Justice Haller in connection with the deposition of Barbara Fletcher in California.

32. Justice Haller stated on July 12, 1991; TR 8):

> "The Court: It seems to me in reading portions of the [Fletcher] deposition that from what I have read, the relevant portions have, in fact, established that there was an intimate relationship between these people . . . . It seems to me incredible that anyone is going to believe that if these two people are traveling together to various - - this one seminar that they [Bender/Fletcher] were at in Washington, and where she [Fletcher] admits yes, they [Bender/Fletcher] were there together and that, in fact, there were periods of time when they [Fletcher/Bender] were by themselves and such, it just seems to me, you know, we're all grown-ups and I think it's very clear here that everybody understands that there folks [Bender/Fletcher] were having an intimate relationship."

33. Fletcher admitted that she had destroyed by shredding most of the important documentation of my achievements at the Red Cross as an executive on the first business day after Bender had fired me in retaliation for my claim of sexual harassment, and my request for an investigation.

34. The vulnerability of the defendants to such disclosures in discovery became apparent on May 13, 1991, when Justice Moskowitz directed that they either proceed to settle the case or she would send it to trial without further delay.

35. Based upon what Fletcher had said in her deposition, it clearly was apparent to defendants that the policies and procedures of defendant Red Cross had been

flagrantly violated by such destruction of evidence; that defendant Bender, Chief Executive Officer, was responsible for what had occurred and that a need for remedial action on the part of the Red Cross was drastic.

36. Rather than taking such remedial action, defendants aided and abetted by attorneys from Weil, Gotshal & Manges devised and adopted the entrapment scenario as a diversionary tactic, in order to create prejudice against me, and to deflect the directive of Justice Moskowitz on May 13, 1991, that the case be settled forthwith or it would go to trial.

37. The urgency of such a diversionary tactics was also made acute by the direction of the Special Referee in the underlying litigation on June 14, 1991, that he would not permit the attorneys of Weil, Gotshal & Manges to claim a right of privacy with respect to the Bender/Fletcher relationship, and that his ruling with respect thereto was imminent.

38. The Special Referee also ordered that defendants produce the Treasurer of the Red Cross for further questioning regarding Bender's expense reports involving the Bender/Fletcher relationship.

39. In addition, the Special Referee indicated that he had under consideration my request for evidence relating to substantial missing funds from the Red Cross which was disclosed in the Fletcher deposition in the amounts of $600,000 and $1,032,000.

40. The entrapment conspiracy was not made the subject of a hearing in or determination by the New York Courts at any time, and the full facts relating thereto should be placed on the record and determined by a jury. (Baer Aff., Exh. I.)

41. The dismissal of my complaint by the New York Court of does not constitute a determination on the merits of any of the facts, claims or causes of action as set forth therein.

42. Nor does the action of the New York Court constitute a determination on the facts involved in the entrapment conspiracy referred to above or the involvement of co-defendants Baer and Jacoby therein.

43. On the contrary, in affirming the dismissal of my action in the New York Courts, the Appellate Division found (Baer Aff. Exh. F; p. 24):

> "It is unclear why and by whom the documents were placed in that precise location and not otherwise safeguarded. . . " (Emphasis added.)

44. Thus no finding or determination by the New York Court precludes the necessity of a determination by this Court on the existence of such entrapment conspiracy, and the active involvement therein by attorneys Baer and Jacoby.

45. Defendants Baer and Jacoby in 92 Civ. 4455 (LBS) are necessary witnesses regarding their involvement in the entrapment conspiracy. Defendant Baer was there when it occurred, and admitted in his affidavit sworn to July 3, 1991, that he was the person who brought, in his briefcase, the documents that were used as the lure in the entrapment conspiracy.

46. The documents that defendants Baer brought in his briefcase had nothing whatsoever to do with any matters pending on June 28, 1991.

47. Baer's acts of bringing such documents with him in his briefcase on that date, and deliberately removing them

therefrom to place them at a location where it was known that I would be sitting, and where it was unavoidable that I would see them, were acts by Baer in furtherance of the conspiracy to entrap me.

48. Since defendant Baer has admitted that he personally brought the entrapment documents with him to Court, he has direct knowledge concerning the circumstances under which he removed the documents from his briefcase, why he did so, why he even had such documents with him, and why they were open and not contained in a protective envelope of any kind.

49. Only defendant Baer can testify as to why, as the Appellate Division noted in its Opinion, the entrapment documents were "not otherwise safeguarded." (Baer. Aff.; Exh. F., p. 24.)

50. Defendant Jacoby in 92 Civ. 4455 (LBS) also is a necessary witness to the entrapment conspiracy, first because he is and was the direct supervisor of attorney Baer and, second, because of the falsity of his own "personal knowledge" statements with respect thereto, including his affidavit of July 3, 1991.

51. Further, at the hearing on the matter before the New York Court on July 11, 1991, after my testimony on my knowledge of the circumstances under which the entrapment documents were delivered into my possession, Jacoby made the statement to the New York Court that was false to my own direct knowledge, namely (TR 146-147):

"THE COURT [Justice Moskowitz]. Counselor [Mr. Jacoby] if I were the plaintiff -- her testimony isn't that she stole papers, but that she sat down and the papers were in front of her, right?"

"MR. JACOBY. Your Honor, these were papers on a counsel [conference] table. She didn't put them there. A lawyer put them there. Not her lawyer. The lawyer on the other side."

"Now, I don't believe for one minute that this pile of papers were sitting directly in front of her in a neat pile facing her four inches off the table."

"The Court. That is the testimony."

"Mr. Jacoby. I understand that."

"The Court. You didn't bring anybody in to say that the papers were scattered, or the papers were on the other side of the table, or the papers were at the foot of the table, or the papers were in any other location. If I choose to believe the plaintiff than her testimony, and I was just looking for it, is that she sat down before argument started and when she sat down, right in front of her, four inches from the edge of the table, was a neat stack of papers." (Emphasis added.)

52. As shown above, defendants have acted to deprive me of my civil and constitutional rights to access to the Courts for a determination of my claims on the merits, contrary

to federal law, through their conspiracy to entrap.

53. Since defendants Baer and Jacoby in 92 Civ. 4455 (LBS), were ringleaders in and necessary witnesses to the acts taken in furtherance of such conspiracy, they are necessary witnesses to my claim that the order and judgment of the New York Court relied upon by them in connection with their present motion to dismiss are invalid and without force and effect as a defense to my claims on the merits in this litigation.

54. As a matter of federal law, Jacoby and Baer and the law firm appearing for defendants in making such motion must be disqualified and a hearing on the entrapment conspiracy conducted before a jury for a determination of the facts thereon.

55. Accordingly, disqualification should be granted, and to my motion to adjourn defendants' motion to dismiss pursuant to Fed.R.Civ. P. 56(f) should be granted for that additional reason.

56. Quid pro quo sexual harassment is an extension of violence toward women that occurs with recurring frequency in the work place in circumstances that make it a form of implied prostitution, extortion and the moral equivalent of rape.

57. As practiced upon women employees, repeated acts of sexual harassment as I experienced, particularly when concealed or covered-up, and retaliated against when objected to, constitute conduct prohibited by the Thirteenth Amendment to the Constitution of the United States as constituting badges or incidents of slavery.

58. Such actions are particularly egregious when committed by officers the Red Cross, an instrumentality of the United States and of the State of New York.

59. My parents did not come to this country from Germany (my mother is a refugee from the Holocaust) to endure or tolerate having members of their family deprived of their civil rights, including their rights to free speech and access to judicial remedies, in connection with such conduct perpetrated against them.

60. As Chief Executive Officer of the Red Cross, defendant Bender abused his authority by creating a hostile and threatening work environment for women, through his dictatorial behavior and repeated acts of sexual harassment, abuse, and retaliation for those who objected to such outrageous conduct.

61. The Board of Trustees of the Red Cross, of which Jesse D. Wolff, a senior attorney with the law firm of Weil, Gotshal & Manges, is a member, and a named co-defendant in 92 Civ. 4455 (LBS), repeatedly failed in its duty of supervising such conduct as came to their attention with respect to defendant Bender.

62. Such conduct did come to their attention with respect to Bender in the documents that were used by Weil, Gotshal & Manges as a part of the entrapment conspiracy as well as by my own complaints and objections to Bender's conduct.

63. I am informed that the dismissal of my lawsuit without findings on the merits means that the allegations in my complaint must be deemed to be meritorious in contemplation of law for the purpose of litigating federal civil rights claims. See McKennon v. Nashville Banner Publishing Company, No. 93-1543, decided January 23, 1995,__ U.S.__, 63 U.S.L.W. 4104.

64. To my direct knowledge, they are meritorious.

65. The actions in furtherance of the conspiracy to entrap, having denied my rights of free speech and access to me in the courts in the State of New York, will increase the number and the extent of the depravity of such miscreant as defendant Bender, known by the Red Cross (and its Trustees) to be a number one womanizer, who seek to shelter their misconduct under the panoply of institutional power including the power to retain counsel with conflicting interests, such as the law firm of Weil, Gotshal & Manges throughout this litigation, as a means of shielding themselves from their employer, also represented by the same law firm, against the exposure of their own misconduct.

66. Such impermissible and discordant conflicts of interest puts that law firm in the position of seeking to defend defendant Bender's repeated acts of misconduct and infractions of Red Cross policies and my constitutional rights, at the same time that it purports to defend the Red Cross itself, which is required to comply with such rights and duties.

67. Such utterly conflicting interests have resulted in a perversion of our adversary system as it operates in the courts of New York, and which defendants are attempting to impose upon this Court as a part of the same conspiracy.

68. The cross-motion to adjourn should be granted for the further reason that defendants have failed to serve and file a Rule 3(g) statement as required by the Civil Rules of this Court when motion such as those that defendants have filed herein are filed.

69. Defendants' motions state that they are filed pursuant to Fed.R.Civ.P. 12(b)(6).

70. In support of said motions, however, they also have submitted extensive information outside the pleadings in the form of an affidavit and substantial documentation.

71. Accordingly, when that is done, Fed.R.Civ.P. 56(f) requires that the motion be treated as one for summary judgment under Rule 56, thus making applicable the requirement for Civil Rule 3(g) statement.

72. Defendants' failure to file a Rule 3(g) statement as to the facts set forth in my complaints that they consider to be undisputed causes substantial prejudice to me particularly because they have not as yet filed answers to the pleadings.

73. The facts alleged and the claims asserted in my complaints in 92 Civ. 4455 (LBS) and 93 Civ. 1334 (LBS) are significantly and substantially different from those pleaded in the underlying complaint in the State Court action. (Baer Aff., Exh. I.) Moreover, I was never accorded a full and fair hearing with respect to any of them.

74. Thus the New York State Court decision and purported judgment of Justice Schoenfeld relied upon here could not preclude such facts and claims from being litigated in this Court even if the Schoenfeld decision is not reversed in the pending appeal, and were determined not to be the result of an entrapment conspiracy in violation of governing Federal Law under the Supremacy Clause of the Constitution. (Art. VI.)

75. Defendants' motions therefore should be adjourned until after they have filed appropriate Rule 3(g) statements so that my attorney may address those issues properly in light of defendants' claims.

76. The Schoenfeld decision and purported judgment relied upon by defendants can not preclude this litigation

because, as shown above, it is subject to reversal as a result of two appeals presently pending in the Appellate Division, First Department.

77. The purported judgment can not preclude the litigation in 92 Civ. 4455 (LBS) and 93 Civ. 1334 (LBS) for the further reason that doing so would violate my rights under 42 U.S.C. § 1986, under which I was required to take precisely the same action of giving notice with respect to the entrapment documents that led to the dismissal of the State litigation in order to protect my rights.

78. My rights under 42 U.S.C. § 1986 take precedence over the technical grounds under which my State Court litigation was dismissed.

79. My cross-motion to disqualify defendants' counsel, named co-defendants in 92 Civ. 4455 (LBS), is also made pursuant to my rights to do so under this Court's Order dated July 7, 1993, giving me leave to "renew the motion" to disqualify the law firm of Weil, Gotshal & Manges and its co-defendant attorneys Mark A. Jacoby, Lawrence J. Baer and Jesse D. Wolff. (Baer Aff. Exhs. X & Y.)

80. In support of my cross-motion to disqualify, counsel who are presently appearing in support of this motion, but who themselves are defendants in 92 Civ. 4455 (LBS), the following documents are incorporated by reference herein:

(1) Reply Affidavit of Joan Carol Lipin in Support of Motion to Disqualify the Law Firm sworn to June 22, 1993 (92 Civ. 4455 (LBS));

(2) Affidavit of Joan Carol Lipin in Support of Cross-Motion sworn to June 17, 1993 (93 Civ. 1334 (LBS));

(3) Affidavit of Joan Carol Lipin in Opposition to Motion for Stay sworn to June 17, 1993 (93 Civ. 1334 (LBS));

(4) Supplemental Affidavit of Joan Carol Lipin in Support of Motion sworn to May 24, 1993 (92 Civ. 4455 (LBS));

(5) Affidavit of Arthur M. Wisehart in Support of Plaintiff's Motion to Disqualify Defendants' Counsel sworn to May 24, 1993 (92 Civ. 4455 (LBS));

(6) Affidavit of Joan Carol Lipin sworn to May 20, 1993 (93 Civ. 1334 (LBS));

(7) Affidavit of Arthur M. Wisehart sworn to May 20, 1993 (93 Civ. 1334 (LBS));

(8) Affidavit of Arthur M. Wisehart sworn to April 22, 1993 (93 Civ. 1334 (LBS));

(9) Reply Affidavit of Joan Carol Lipin sworn to March 3, 1993 (92 Civ. 4455 LBS));

(10) Affidavit of Joan Carol Lipin sworn to February 17, 1993 (92 Civ. 4455 (LBS));

(11) Reply Affidavit of Joan Carol Lipin sworn to December 2, 1992 (92 Civ. 4455 (LBS));

(12) Affidavit of Michael H. Prince sworn to December 2, 1992 (92 Civ. 4455 (LBS));

(13) Reply Affidavit of Arthur M. Wisehart in Support of Petition for Mandamus dated November 19, 1993 (92 Civ. 4455 (LBS));

(14) Reply Affidavit of Joan Carol Lipin in Support of Petition for Mandamus dated November 19, 1993 (92 Civ. 4455 (LBS));

(15) Petition for a Writ of Mandamus dated October 14, 1993 (92 Civ. 4455 (LBS));

(16) Affidavit of Good Faith of Arthur M. Wisehart sworn to November 13, 1992 (92 Civ. 4455 (LBS));

(17) Affidavit of Joan Carol Lipin in Support of Plaintiff's Motion to Disqualify Judge and Counsel for Defendants sworn to November 13, 1992 (92 Civ. 4455 (LBS));

(18) Reply Affidavit of Joan Carol Lipin to Vacate Stay dated October 28, 1992 (92 Civ. 4455 (LBS));

(19) Affidavit of Joan Carol Lipin sworn October 6, 1992 (92 Civ. 4455 (LBS));

(20) Affirmation of Arthur M. Wisehart sworn to September 3, 1992 (92 Civ. 4455 (LBS));

(21) Notice of Appeal dated August 4, 1992 (92 Civ. 4455 (LBS));

(22) Pre-Argument Statement dated August 17, 1992 (92 Civ. 4455 (LBS)); and

(23) Notice of Motion for Reargument dated July 21, 1992 (92 Civ. 4455 (LBS)).

81. Also incorporated by reference herein is the Official Transcript of oral argument in 92 Civ. 4455 (LBS) before this Court dated December 3, 1992, in which this Court stated on the record:

> "THE COURT: In this case there is particularly no relationship between whether or not the plaintiff sustained damages as a result of sexual harassment by her employer and any of the matters which we have been talking about and I have made it very clear that I have not made any judgment or assessment or even inquiry into the underlying matters." (TR 4; emphasis added.)
>
> * * * * *
>
> "THE COURT: You know, what I tried to suggest at some point is that a great deal of time, effort, energy, money is being spent on matters unrelated to the merits of the plaintiff's sex discrimination case and whether some thought should not be given to the fact that that is so-and-so that one might move forward on the underlying merits of the claim."
>
> "MR. WISEHART: That's what the plaintiff desires to do. That's her whole object, is to get freed of the shackles of this situation which she finds herself." (TR 15; emphasis added.)

WHEREFORE, my Cross-Motion to Adjourn, to provide a trial by jury with regard to the entrapment conspiracy as set forth above, to disqualify the law firm of Weil, Gotshal & Manges and to provide other relief should be granted, and defendants' improper motion to dismiss should be denied in the interest of justice.

Respectfully submitted,

/s/

Joan Carol Lipin

Sworn to before me this

13th day of March, 1995:

/s/

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

- against -

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER and and JESSE D. WOLFF,

Defendants.

92 Civ. 4455 (LBS)

REPLY AFFIDAVIT OF JOAN CAROL LIPIN DATED MARCH 28, 1995, IN SUPPORT OF HER CROSS-MOTION OF MARCH 13, 1995

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action, and respectfully submit this reply affidavit in opposition to defendants' Memorandum of Law dated March 27, 1995, which is addressed to my cross-motion dated March 13, 1995.

2. Defendants and their co-defendant counsel in 92 Civ. 4455 (LBS), attorneys Jacoby, Wolff and Baer of the law

firm of Weil, Gotshal & Manges, did not controvert the factual showing in my affidavit in support of my cross-motion.

3. Accordingly, my cross-motion should be granted based on the factual showing in my affidavit.

4. Defendants now in effect concede that their motion is based only upon the Moskowitz Order of January 9, 1992, in the form affirmed by the Appellate Division, First Department in its Order entered May 11, 1993, and the New York State Court of Appeals decision entered November 1, 1994.

5. The facts as set forth at paragraphs 4-22, 63-65, of my affidavit sworn to March 13, 1995, show that this was a dismissal on a without prejudice basis.

6. Defendants have abandoned reliance on the Schoenfeld decision dated August 18, 1994, and the ensuing purported judgment, in their Memorandum dated March 27, 1995.

7. Further, defendants do not deny that the issues discussed in my brief appealing the Schoenfeld decision of August 18, 1994, filed with the Appellate Division, First Department, on March 10, 1995, will be likely to be reached in the Appellate Division of the New York Supreme Court, First Department, in its June Term, or that the decision of the Appellate Division will be germane to the issues raised in my cross-motions dated March 13, 1995, pending before this Court.

8. Based on the factual showing in my affidavit in support of my cross-motion, and their own failure to submit any evidence whatsoever in response thereto, defendants are unable to contend that I was not a victim of a deliberate entrapment

conspiracy in which they (and their counsel) were participants.

9. Since the dismissal of the State action was without prejudice, and not on the merits, under New York CPLR 5013 and § 205, my commencement of the actions in 92 Civ. 4455 (LBS) and 93 Civ. 1334 (LBS), was clearly appropriate.

10. The factual basis for serious violations of my due process and constitutional rights, as shown in my affidavit.

11. As no contrary factual showing has been made by defendants, their violation of such rights stands undisputed.

12. Footnote 2 at page 11 of defendants' reply memorandum is false. As is shown in my affidavit, I did not ignore defendants' res judicata arguments.

13. On the contrary, res judicata is not available to defendants under New York law as well as Federal law as shown at pages 1-7 annexed hereto as Exhibit A and at pages 8-18 annexed hereto as Exhibit B of the Memorandum of Law submitted in support of my cross-motion.

14. Further, my verified amended complaint in 92 Civ. 4455 (LBS), alleges claims for violations of Section 487 of the New York Judiciary Law not involved in my New York action.

15. My verified amended complaint in 93 Civ. 1334 (LBS) contains fact specific allegations for retaliatory spoliation and tortious interference; constitutional tort violating 42 U.S.C. § 1983; Civil Rights Conspiracy violating 42 U.S.C §1985 (3); waste, injury to and spoliation of property; retaliation under the Human Rights Law of the State of New York; retaliation under the Administrative Code of the City of New York; Quantum

Meruit and Unjust Enrichment. My State action does not set forth the same claims, nor could I have done so. (Baer Aff.; Exh. I).

16. In addition, in my affidavit sworn to June 17, 1993, I further distinguish 93 Civ. 1334 (LBS) and 92 Civ. 4455 (LBS), from the action in the New York Court. (Exhibit C annexed hereto and incorporated by reference herein.)

17. Defendants' contention in footnote 2, p. 11, of their Memorandum that I supposedly "had an opportunity to litigate each and every issue in Lipin II and Lipin III up through New York's highest court" is false.

18. I did not have the opportunity to litigate any of those issues.

19. On the contrary, the courthouse doors of the New York Court were closed to me as a result of the entrapment conspiracy set forth in my affidavit in support of my cross-motion.

20. Since defendants have put in no opposing affidavit, the showing in my affidavit stands unrefuted, and establishes that I was deprived of any opportunity to litigate any of the issues in the New York Court.

21. Similarly, since defendants have made no factual showing on the disqualification issue, the showing in my affidavit stands unrefuted.

22. In such circumstances, disqualification is mandatory, particularly since the record as made establishes that counsel for defendants, while at the same time they were representing the Red Cross, were themselves conscious of corruption on the part of defendant Bender in regard to (a) his

dealings with female Red Cross employees, (b) the destruction and spoliation of evidence, and (c) the lack of fiscal accountability and controls.

WHEREFORE, it is submitted that my cross-motion should be granted and defendants' motion denied.

Respectfully submitted,

/s/

Joan Carol Lipin

Sworn to before me this

28th day of March 1995:

/s/

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

- against -

AMERICAN RED CROSS IN GREATER NEW YORK, AMERICAN NATIONAL RED CROSS, ROBERT M. BENDER, JR., JAMES T. BYRNE, JR., CARL DESCH, and BARBARA E. FLETCHER,

Defendants.

93 CIV. 1334 (LBS)

AFFIDAVIT OF JOAN CAROL LIPIN IN OPPOSITION TO DEFENDANTS' MOTION TO STAY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action.

2. This affidavit is respectfully submitted on the basis of personal knowledge in opposition to defendants' motion dated May 10, 1993, to stay "the prosecution of this action on the same basis and on the same terms" as 92 Civ. 4455 (LBS).

3. Defendants admit the State Action was not dismissed on the merits.

4. The Appellate Division Opinion of May 11, 1993, did not alter the without prejudice terms of the dismissal although defendants had sought such relief.

5. Defendants' admission that the State Action was not dismissed on the merits is shown by the disparity in relief they now seek for the fourth time, "dismissal with prejudice," in the State Action in their Notice of Motion to Justice Ciparick dated May 21, 1993, a copy of which is annexed hereto as Exhibit A.

6. Moreover, as shown therein, defendants did not renew their State Court application for contempt, contrary to their representation to this Court at page 6 of defendants' Memorandum of Law dated May 10, 1993.

7. Thus defendants have effectively conceded that the reasons for the stay granted in 92 Civ. 4455 (LBS) on July 7, 1992, no longer exist:

> (a) by the decision of Justice Ciparick on December 28, 1992, the New York Court has interpreted its Order of January 9, 1992, and found that such Orders did not constitute a dismissal with prejudice; and
>
> (b) that plaintiff was not in contempt of any orders of the New York Court for commencing 92 Civ. 4455(LBS).

8. So much is conceded by the affidavit of Mr. Jacoby to Justice Ciparick sworn to May 20, 1993 (Exhibit B annexed hereto).

9. In that affidavit Mr. Jacoby admits that "By Order of December 28, 1992, defendants' motion seeking confirmation that the Dismissal Order was intended to be a dismissal 'with prejudice' was denied" by the New York Court. (Jacoby Aff. ¶ 7.)

10. The Jacoby affidavit of May 20, 1993, itself is further evidence of why he and his firm must be disqualified from representing defendants.

11. The answer to the question of "why and by whom" the documents were placed in that precise location and not otherwise "safeguarded, [and] counsel for defendants were sitting directly across the 12 x 6 foot counsel table" left open by the decision of the Appellate Division can only be answered by attorneys for Weil, Gotshal & Manges, making them necessary witnesses. (App. Div. Op. at p. 24, Exhibit T annexed hereto.)

12. As clearly shown in plaintiff's affidavit, the testimony of Mr. Jacoby and others in his firm will be a necessity. (Lipin Aff., 5/26/93, ¶¶ 4-9, annexed hereto as Exhibit C.)

13. My Supplemental Affidavit to Justice Ciparick sworn to June 9, 1993, sets forth the following facts in response to Mr. Jacoby's false assertions sworn to in his affidavit dated May 20, 1993 (Exhibit D annexed hereto):

> "10. The false affidavit of Jacoby dated May 20, 1993 at ¶¶ 1, 4, 6, 8, 9, 11 & 12, defendants' memorandum dated May 21, 1993 at pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 & 11, and defendants' reply memorandum dated June 1, 1993 at pages 1, 3, 5, 6 & 7 provides further evidence of Canon 5 violations by the attorneys

of WGM.

* * * * *

"12. The Jacoby affidavit at paragraph 4 further attempts to deceive this Court by falsely stating:

> "-- and even expressly incorporating by reference -- the information contained in the Privileged/Work Product Documents." (Jacoby Aff., ¶ 4.)

"13. Mr. Jacoby knows full well that the statement "incorporating by reference" is not the factual sentence as alleged in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS), and thereby willfully intends to deceive this Court.

"14. Mr. Jacoby willfully omits the word "defamatory" from his incomplete sentence in paragraph 4 of this affidavit sworn to May 20, 1993.

"15. By the willful omission of the word defamatory from the Jacoby affidavit at paragraph 4, defendants continue to practice violations of Section 487 of the New York Judiciary Law, and thereby admit that the Disputed Documents are tangible evidence in support of this allegation.

"16. The Hughes affidavit sworn to May 10, 1993 in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS) and the Jacoby affidavit sworn to May 20, 1993 in the instant action, and submitted in support of defendants' motion, provides further evidence requiring the disqualification of Mr. Jacoby and his firm from further participation in this litigation as counsel for the Red Cross defendants.

* * * * *

"24. In denying the relief requested by Weil, Gotshal & Manges in the Order to Show Cause dated July 10, 1992, Justice Ciparick necessarily decided that the institution of Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer and Jesse D. Wolff, 92 Civ. 4455 (LBS) by the filing of the complaints therein did not violate the Orders of Justice Moskowitz dated January 9, 1992.

"25. Moreover, Mr. Jacoby at paragraph 6 sworn to May 20, 1993, despite this knowledge, furthers his intended and willful deceit to this Court when he falsely says

> "6. By Order to Show Cause dated July 10, 1992, defendants moved this Court ... confirming

> that the Dismissal Order was intended to be a dismissal 'with prejudice,' and reaffirming Justice Moskowitz' prior suppression order...."

"26. Furthermore, contrary to Jacoby's second false assertion in paragraph 6,

> "defendants' motion for a "broad express suppression order,"

was not granted by this Court. Rather, this Court's Order of December 28, 1992, explicitly states:

> "item (b) relief is granted subject to the Appellate Division's determination of plaintiff's appeal."

14. Disciplinary Rule 5-102(a) of the Code of Professional Responsibility, 22 NYCRR § 1200.21(a), states:

> "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on behalf of the client, the lawyer shall withdraw as an advocate before the tribunal. . . ." (Emphasis added.)

15. I am informed that withdrawal of Mr. Jacoby and his firm as counsel for defendants is mandatory in such circumstances.

16. The history of defendants' retroactive and pre-dated tactics to predict future court rulings on motions not yet heard, let alone ruled upon by the courts, can not be condoned and should not be countenanced by this Court.

17. The Court does not have "ample authority to stay the proceedings herein," contrary to footnote 2, page 6 of defendants' memorandum dated May 10, 1993.

18. The stay and seal granted by this Court on July 7, 1992 in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS), was procured by virtue of fraud in the inducement by defendants and their counsel who themselves are co-defendants in that action. (Lipin Aff., 10/6/92, ¶¶ 42-45, 64-112, 122-135, 181-185; Lipin Aff., 11/11/92, ¶¶ 8-11, 36-66, 74-76, 79-82, 84; Lipin Reply Aff., 12/2/92, ¶¶ 2-5, 26-63.)

19. There is no basis of fact in the knowingly false claims by Mr. Hughes that "the core facts and legal claims alleged" in 92 Civ. 4455 (LBS), and the instant action 93 Civ. 1334 (LBS), have "substantial identity." (Hughes Aff., ¶¶ 8-11.)

20. The instant action is not a "duplication, amendment and/or supplementation" of 92 Civ. 4455 (LBS), as deceptively asserted by Mr. Hughes at paragraph 11 of his affidavit. (Hughes Aff., ¶ 11.)

21. The known falsity of these assertions of Mr. Hughes, with willful intent to deceive this Court, is further evidence of the propensity of the attorneys of the law firm of Weil, Gotshal & Manges to engage in continuing violations of Section 487 of the New York Judiciary, as alleged in Joan

Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS).

22. Until Weil, Gotshal & Manges is disqualified from this action as counsel for defendants, and as named co-defendants through their attorneys Jacoby, Baer and Wolff in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS), the instant action will continue to be hopelessly tainted and compromised.

HISTORY OF JOAN CAROL LIPIN v. AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF, 92 Civ. 4455 (LBS),

THE FIRST FEDERAL ACTION

23. This Court sealed and stayed 92 Civ. 4455 (LBS), on July 7, 1992, upon the basis of a Show Cause Order of that date brought on by co-defendant/attorney Jacoby for all defendants.

24. I am informed that such action, together with sealing of the verified complaint and the amended verified complaint therein, was in violation of my First Amendment rights and my common law rights.

25. This Court admitted on July 7, 1992 that it had not read the complaint in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York,

Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS). (TR, p. 2)

26. This Court also admitted on July 7, 1992, that, in reaching its decision to seal the complaint therein and stay the action, it had relied on the affidavit of attorney Jacoby, co-defendant/attorney in that action, sworn to July 7, 1992, and the affidavits of attorneys Jacoby and Baer, co-defendant/attorneys in that action, sworn to July 3, 1991 ("personal knowledge" affidavits known by co-defendant/attorneys Jacoby and Baer to be false), and the Order of January 9, 1992. Id.

27. Co-defendant/attorney Jacoby with intent to deceive this Court withheld the second Order of January 9, 1992, from Exhibit A attached to defendants' Order to Show Cause dated July 7, 1992.

28. Defendant/attorney Jacoby, counsel for all defendants in 92 Civ. 4455 (LBS), also attached to defendants' Exhibit A of their Show Cause a tampered, hand-altered Official Court Transcript incorporated into the Order of January 9, 1992 as the purported Official Transcript.

29. Moreover, defendant/attorney Jacoby falsely states in his affidavit at paragraphs 14, 15, 16, 17, & 18 sworn to July 7, 1992, in support of defendants' purported "emergency" Show Cause Order of July 7, 1992 (one day before the Red Cross defendants' answers were due, and two days before co-defendants' Jacoby, Baer and Wolff's answers were due) that the Disputed Documents were used as the basis for certain allegations set forth in the Verified Complaint and Amended Verified Complaint in 92 Civ. 4455 (LBS).

30. On the basis of the stay received from the Court on July 7, 1992, defendants thereupon obtained a Show Cause

Order of July 10, 1992 in the State Action.

31. Justice Carmen Beauchamp Ciparick in the State Action entered her Order dated December 28, 1992, a copy of which is annexed hereto as Exhibit E.[1]

32. With respect to items "(a)" and "(c)" referred to in the decision of Justice Ciparick which were denied, defendants previously had made the following requests (Order to Show Cause dated July 10, 1992, Exhibit F annexed hereto):

> "(a) finding plaintiff and plaintiff's counsel, Arthur Wisehart, in criminal and civil contempt of this Court's Order dated January 9, 1992, pursuant to § § 750 and 753 of the Judiciary Law, respectfully, for making improper use of the privileged information contained in defendants' counsel's documents taken by plaintiff off of the counsel's table in a judicial hearing room on June 28, 1991, (hereinafter the "Privileged/Work Product Documents") and ordered returned to defendants' counsel and suppressed by this Court, by using such information as the basis

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[1] Justice Karla Moskowitz recused herself for bias and prejudice from further participation in the State Action on August 6, 1992, prior to ruling on defendants' contempt motion. The State Action was purportedly re-assigned to Justice Fingerhood who sent the motion back to Justice Moskowitz pursuant to her Order of October 1, 1992. The State Action was purportedly re-assigned a second time to Justice Carmen Beauchamp Ciparick who denied "(a)" and "(c)" of defendants' contempt motion in her Order dated December 28, 1992.

for certain allegations set forth in plaintiff's Complaint and Amended Complaint filed in an action commenced on June 17, 1992, in the United States District Court for the Southern District of New York captioned as Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer and Jesse D. Wolff, 92 Civ. 4455 (LBS) (Hereinafter referred to as the "Federal Court Action"); and imposing the appropriate sanctions for such contempt;" and

* * * * *

"(c) sanctioning plaintiff, plaintiff's counsel, Arthur Wisehart, and the firm of Wisehart & Koch, pursuant to § 130 of the Rules of the Chief Administrator of the Courts; such sanction should include, but not limited to, an assessment of defendants' costs and attorneys fees for the present motion and defendants' motion in the Federal Court Action granted by the Hon. Leonard B. Sand, U.S.D.J., on July 7, 1992, staying the action and sealing the Complaint and Amended Complaint therein."

33. In view of the decision denying the "civil and criminal contempt" and sanctions requests of defendants, Justice Ciparick necessarily decided that no information regarding the Disputed Documents that was not already in the public record or otherwise known to me from independent sources was used in the Verified Complaint or the Amended Verified Complaint in 92 Civ. 4455 (LBS), or that the Orders of Justice Moskowitz of January 9, 1992, did not in any way prohibit the filing of the complaints therein on June 17, 1992, and June 23, 1992,

respectively, prior to the Order to Show Cause of July 10, 1992, procured by the attorneys in the New York proceeding, who themselves are co-defendants in that litigation.

34. Contrary to defendants' representation at page 6 of their Memorandum of Law dated May 10, 1993, defendants did not renew their "State Court application for contempt" in their post-judgment "Final Judgment" motion to the State Court dated May 21, 1993.[2]

35. Moreover, the Hughes affidavit sworn to May 10, 1993, submitted in support of defendants' motion, provides further
evidence requiring the disqualification of Mr. Jacoby and his firm from further participation in this litigation as counsel for

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[2] The Order dated January 9, 1992 in the State Action, makes it very clear that the decision rendered was final and that final judgment was directed to be entered. The Order states in the pertinent part: "Clerk directed to enter judgment dismissing complaint as to all defendants pursuant to this Order." The decision dated January 9, 1992, corroborates the finality intended by the Judge in directing entry of final judgment: "Therefore, I am dismissing the lawsuit in its entirety."

The defendants attempt to mislead this court, and the State Court when they state (Def. Mem. p. 6) that the defendants' motion is to enter final judgment in the first instance. This is not possible since the direction to enter the final judgment was given by Justice Moskowitz to the Clerk eighteen months ago, on January 9, 1992. The Order of January 9, 1992, in the State Action is therefore a final judgment dismissing the complaint in its entirety.

the Red Cross defendants.[3]

HISTORY OF THE INSTANT ACTION

36. A Verified Complaint and Amended Verified Complaint herein were filed respectfully on March 5, 1993, and March 12, 1993.

37. The instant action was initially assigned to Judge Sonia Sotomayor who calendared a Rule 16(c) motion for May 3, 1993, at the request of my attorney. (Wisehart Ltrs. to Judge Sotomayor dated 3/15/93 & 3/25/93; Crt. Order 3/17/93, annexed hereto as Exhibits G, H & I.)

38. Defendants falsely asserted to Judge Sotomayor in the Hughes letter dated 3/10/93 that the instant action is

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[3] Mr. Jacoby's firm represents defendant Barbara E. Fletcher in Joan Carol Lipin v. American Red Cross in Greater New York, American National Red Cross, Robert M. Bender, Jr., James T. Byrne, Jr., Carl Desch, and Barbara E. Fletcher, 93 Civ. 1334 (LBS), the Red Cross assistant of defendant Bender who admitted that she shredded, discarded and commingled approximately half of my work product and files relating to my performance at the Red Cross on the first business day after my termination, at a time that it was known to the Red Cross that defendants Bender/Fletcher were involved in an open and notorious affair.

Defendant Fletcher, a non-party defendant, has not been an employee of the Red Cross for over three years. The representation by Weil, Gotshal & Manges of a non-party defendant, who admitted to the unlawful shredding of evidence relevant to this litigation requires the mandatory disqualification.

"related to" 92 Civ. 4455 (LBS), and informally requested that the instant action be transferred to Judge Sand on the basis of purported "relatedness." (Hughes Ltr., annexed hereto as Exhibit J.)

39. Despite objections from my attorney, Judge Sand, who has again exhibited bias and prejudice as he did in granting the sealing and stay in 92 Civ. 4455 (LBS), accepted the transfer of the instant action on purported "relatedness" to 92 Civ. 4455 (LBS), solely on the say-so of defendants' counsel from the firm of Weil, Gotshal & Manges, whose attorneys Jacoby, Baer and Wolff are themselves co-defendants in 92 Civ. 4455 (LBS), although at the time he did so Judge Sand was well aware that the attorneys requesting such action purportedly on behalf of other clients were themselves named defendants in that action. (Wisehart Ltr. to Judge Sand dated March 18, 1993, annexed hereto as Exhibit K.)

40. Judge Sand who admitted on July 7, 1992 that he had not read the complaint in 92 Civ. 4455 (LBS), does not have direct knowledge of the allegations contained therein.

41. Judge Sand accepted the transfer of the instant action on purported "relatedness, pursuant to his Order of April 1, 1993[4], and requested that all parties notify the Court by April 19, 1993 of "any motions or proceedings" they wished to

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[4] It is respectfully submitted that the Order of this Court to accept the instant action as purportedly "related" to 92 Civ. 4455 (LBS), as falsely asserted by defendants whose attorneys Jacoby, Baer and Wolff are themselves co-defendants in that action, is seriously flawed and provides further evidence of (a) the continuing bias and prejudice of this Court against me, and (b) that the proceedings in the instant action are "hopelessly tainted and compromised."

bring. (Crt. Order, Exhibit L annexed hereto.)

42. My attorney duly notified the Court. (Wisehart Ltr. _4/19/93, Exhibit M annexed hereto.)

43. With respect to defendants' instant motion, my attorney sent the annexed letter of 4/20/93 (Exhibit N annexed hereto):

> "Please note the attached letter in which counsel for defendants takes for granted what your decision will be with regard to their anticipated motion for a stay in the above entitled action, and abrogates Fed.R.Civ.P. 37(d) in the process."
>
> "Obviously defendants and their counsel arrogantly regard the result as both foreordained and retroactive, and plaintiff again requests Your Honor's recusal on grounds of personal bias and prejudice."

44. This Court, in ex parte communications to defendants' counsel granted defendants permission to bring their instant action, as evidenced bv the admission of Mr. Hughes at paragraph 7 of his affidavit sworn to May 10, 1993:

> "7. On April 19, 1993, defendants wrote to this Court advising the Court of their desire to file the instant motion. The undersigned was advised that defendants could proceed with the filing of this motion." (Emphasis added.)

45. My attorney received no such advice from the Court with respect to the motions that I desired to bring for (a)

the disqualification of the law firm of Weil, Gotshal & Manges, and (b) the recusal of the Judge, as stated in my attorney's letter of April 20, 1993.

46. Further bias and prejudice displayed against me is shown by the Court's condonation of defendants' default in this action.

47. On April 16, 1993, I caused to be duly served and filed a Request for Entry Default in accordance with the procedures established by the Clerk of United States District Court for the Southern District of New York.

48. I am informed that defendants were in default for failure to plead or answer my Amended Verified Complaint by April 15, 1993, in contravention of Fed.R.Civ.P 12(a) and the Order of Judge Sotomayor dated March 25, 1993 (Endorsed Memo, Exhibit O, annexed hereto.)

49. Defendants never responded or objected to my Request for Entry of Default.

50. On May 10, 1993, defendants filed a motion to stay the above-entitled action after receiving permission from the Court to do so.

51. Permission to do so was requested by letter from defendants dated April 19, 1993, in response to this Court's Order dated April 1, 1993, directing the parties to advise the Court on or before April 19, 1993

> "of the motions, if any, they wish to file or other proceedings which they wish the Court to conduct."

52. However, by the time defendants' counsel wrote their letter of April 19, 1993, they were already in default.

53. Judge Sand's decision to allow defendants to go forward with their motion to stay the above-entitled action is evidence of bias and prejudice given the fact that defendants already were in default as of the date of their request on April 19, 1993.

54. Moreover, my counsel informed the Court of defendants' default by letter on April 19, 1993, which this Court chose to disregard in abrogation of my rights.

55. On April 22, 1993, in accordance with the procedures established by the Clerk of United States District Court for the Southern District of New York, I caused to be filed a Default Judgment which on information and belief was signed by the Judgment Clerk and sent to Judge Sand's chambers for signature. (Exhibit P, annexed hereto.)

56. Judge Sand never moved or acted upon my request for entry of default against defendants.

57. In response to defendants' motion for a stay of the above-entitled action my counsel on May 20, 1993, cross-moved to disqualify opposing counsel and dismiss defendants' motion due to lack of standing as a result of their willful default.

58. Defendants again chose not to respond to my contention that they were in willful default.

59. Defendants' motion for a stay of the above-entitled action was to be heard on May 27, 1993.

60. At the outset Mr. Wisehart explained to this Court that defendants had no standing to bring the instant motion due to their willful default. (TR 5/27/93, pp. 1-7, Exhibit Q annexed hereto.)

61. Defendants' excuse was that when the Court ordered them to make any requests for making a motion on or before April 19, 1993, they were under the impression that they were only required to make the request not to answer. (Ibid., pp. 8-10.)

62. Defendants were explicitly directed by Judge Sotomayor in her Order dated March 25, 1993, to answer within (10) ten days after the Order granting or denying reassignment to Judge Sand.

63. Defendants never requested or made a formal application to this Court to

(a) vacate the Order of Judge Sotomayor;

(b) to vacate the default; or

(c) to extend the time in which they had to answer.

64. It defies comprehension that the defendants could presume or imply such an extension of their time to answer based merely upon an invitation from the Court which allowed parties to request permission to make a motion, particularly when they were already in default by the time they got around to writing their letter of April 19, 1993, informing this Court of their desire to move for a stay.

65. I have been expected to observe every point of Federal Procedure religiously but yet when defendants

knowingly make a serious and willful misstep this Court permits them to brush it aside as of no consequence.

66. It also defies comprehension that Your Honor, in your functioning capacity as a Federal Judge of the United States District Court of the Southern District of New York, so blatantly displayed personal hostility and bias toward me while at the same time infringing my Constitutional Rights of access to the courts when Your Honor ruled on May 27, 1993 (TR pp. 12-13, Exhibit Q):

> "THE COURT [Judge Sand]: So there be no ambiguity, however, the court hereby stays until further direction any and all proceedings in Lipin one, two and three to the extent to which they are within the jurisdiction of this court.
>
> * * * * *
>
> "THE COURT: Lipin one is in the state court, but in Lipin two and three. That includes the filing between now and June 10 of Lipin four or Lipin five or Lipin ad infinitum." (Emphasis added.)

67. It is respectfully submitted that Your Honor should recuse himself for personal animus, bias and prejudice for the reasons set forth herein, and for the reasons set forth in my affidavit sworn to November 13, 1992, incorporated by reference, from further involvement in this action.

THE CORE FACTS AND LEGAL CLAIMS IN THE TWO FEDERAL ACTIONS ARE SEPARATE AND DISTINCT

68. No information from any disputed documents on which an attorney-client privilege has been claimed is contained in the complaint in this action; all of the information used in connection in this action is based upon my direct personal knowledge or information produced by the New York Red Cross in discovery.

69. The meritless and far-reaching false assertions by defendants with respect to Exhibit E attached to the Hughes affidavit (Hughes Aff. ¶ 9) is essentially the same tactic used by co-defendant/attorney Jacoby in defendants' obtaining the Order to Show Cause of on July 7, 1992, in 92 Civ. 4455 (LBS), on an emergency basis and without any prior notice when my attorney was unavailable. (TR 7/7/92.)

70. Defendants falsely asserted that in 92 Civ. 4455 (LBS) information was used from the Disputed Documents "as the basis of certain allegations" in the Complaint and Amended Complaint in that action.

71. However, the Order of Justice Ciparick dated December 28, 1992, denied defendants the remedies requested by them upon the basis of false assertions by co-defendant/attorney Jacoby and defendants in 92 Civ. 4455 (LBS). (Exhibits E & F annexed hereto.)

72. Justice Moskowitz in her Orders of Janaury 9, 1992, declined to grant defendants' request for a suppression order at "(d)," and "(f)," set forth at page 21 of defendants' reply memorandum of their Show Cause Order dated July 10, 1991:

> "(d)" directing plaintiff, her agents and attorneys, and all other persons, known or unknown, to whom notice shall come, to refrain from disseminating to anyone (including, but not limited to, any attorneys subsequently retained) any information pertaining to the contents of the Privileged/Work Product Documents; and
>
> "(f)"suppressing, for use by plaintiff, in this action if it is permitted to proceed, all information set forth in the Privileged/Work Product Documents."

The January 9, 1992 Official Transcript incorporated by reference into the Orders states at pages 11 & 12:

> "THE COURT [Justice Moskowitz]: All copies ... you will deliver that within ten days of service of the copy of an order that I am writing out right now [January 9, 1992]. You are not to do anything with that material ... in the interim." (Emphasis added.)

73. Justice Moskowitz clearly did not rule on defendants' relief sought in "(d)" and "(f) of their reply memorandum dated July 10, 1991.

74. Mr. Jacoby's and defendants' deceit to this Court in making the contrary contention should not be countenanced.

75. Defendants have since abandoned this fiction and now embrace the newly concocted position of purported "relatedness" of the instant action to 92 Civ. 4455 (LBS), as set forth in the false Hughes affidavit at paragraphs 9 through 11.

76. However, in fact, this action contains none of the allegations that caused the Court to issue a stay and seal the complaint in 92 Civ. 4455 (LBS).

77. The two federal actions include different defendants and causes of action:

(a) the named defendants in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS) include co-defendant/attorneys (1) Mark A. Jacoby, (2) Lawrence J. Baer and (3) Jesse D. Wolff of the firm of Weil, Gotshal & Manges, counsel for all defendants;

(b) the named defendants in the instant action include (1) James T. Byrne, Trustee of the New York Red Cross and Assistant Treasurer, (2) Carl Desch, Trustee of the New York Red Cross and Treasurer, and (3) Barbara E. Fletcher;

(c) the central causes of action in the instant case arise from defendants' retaliatory spoliation of evidence and tortious interference; the willful destruction of evidence; including crucial documents and files that have to do with my performance as an employee of the Red Cross; and

(d) the central causes of action in the first federal action, Joan Carol Lipin v. American National Red Cross, American Red Cross in

Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS), arise from conspiratorial retaliation and defamation by defendants as a result of their knowledge and anticipation that I intended to bring a sexual harassment action against Robert M. Bender, Jr., Chief Executive Officer of the New York Red Cross.

78. Mr. Hughes makes the flat false assertion in paragraph 9 of his affidavit that defendants have "compiled a (non-exhaustive) list matching the allegations" in the instant action to allegations in 92 Civ. 4455 (LBS) but does not provide the Court with an analysis. (Hughes Aff., ¶ 9.)

79. Such irresponsible, self-serving and meritless statements by Mr. Hughes are further evidence of defendants' continuing acts that "taint and compromise" the proceedings in the instant case as evidenced by the "hopelessly tainted and compromised" history in 92 Civ. 4455 (LBS) by attorneys who themselves are co-defendants, and their continuing intent to deceive the Court in violation of Section 487 of the New York Judiciary law.

80. Mr. Hughes falsely states at page 5 of defendants' memorandum that "plaintiff's commencement of an action in Federal Court on the same claims -- in which the subject matter of the purloined privileged/work product documents is in issue -- is raised as much by Lipin III as it is by Lipin II" is further evidence requiring the disqualification of Mr. Jacoby and his firm from further participation in this litigation as counsel for the Red Cross defendants. (Mem. p. 5.)

81. The falsity of this statement is further shown by the ruling of Justice Moskowitz on July 11, 1991 at pages 146-147:

> "The Court[Justice Moskowitz]: Counselor, if I were the plaintiff -- her testimony isn't that she stole papers, but that she sat down and the papers were in front of her, right?"
>
> "Mr. Jacoby: Your honor, these were papers on a counsel table. She didn't put them there. A lawyer put them there. Not her lawyer. The lawyer on the other side.
>
> Now, I don't believe for one minute that this pile of papers was sitting directly in front of her [plaintiff] in a neat pile facing her four inches off the table."
>
> "The Court[Justice Moskowitz]: That is the testimony."
>
> "Mr. Jacoby: I understand that."
>
> "The Court[Justice Moskowitz]: You didn't bring anybody in to say that the papers were scattered, or the papers were on the other side of the table, or the papers were at the foot of the table, or the papers were in any other location. If I choose to believe the plaintiff than her testimony, and I was just looking for it, is that she sat down before argument started and when she sat down, right in front of her, four inches from the edge of the table, was a neat stack of papers." (Emphasis added.)

82. Moreover, as stated above, Justice Ciparick denied relief sought by defendants in "(a)" and "(c)" of their contempt motion dated July 10, 1992.

83. The use of such false statements by Mr. Hughes under the necessary witness rule makes the disqualification of his firm mandatory from further proceedings in this action and in 92 Civ. 4455 (LBS).

DEFENDANTS' ADMISSIONS BY OMISSIONS

84. In his affidavit at paragraph 9-11, Exhibit E, purported "matching allegations" in the instant action, Mr. Hughes fails to refer to paragraphs 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 196, 197, 198, 199, 200, 200(a), 200(b), 200(c), 200(d), 200(e), 200(k), 200(l), 200(m), 200(n), 200(o), 200(p), 200(q), 200(q)(i), 200(q)(ii), and 200(q)(iii), 201, and 202 in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS).

85. Defendants thereby admit by omission that the instant action does not allege a claim for violation of Section 487 New York Judiciary Law and that it therefore is not "related" to 92 Civ. 4455 (LBS).

86. Moreover, Mr. Hughes fails to identify "matching allegations" in the instant action to paragraphs 203, 204, 205 in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS).

87. Furthermore, Mr. Hughes fails to identify "matching allegations" in the instant action to paragraphs 206, 207, 208, 209, 210, and 211 in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS).

88. Moreover, defendants admit by omission that the instant action does not contain "matching allegations" of violations of 42 U.S.C. § 1986, and is not "related" to paragraphs 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 234, 235, 236, 237, 239, 240, 241, 242, 243, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, and 275 in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS)." (Hughes Aff., ¶ 9, Exhibit E.)

89. Moreover, Mr. Hughes fails to identify "matching allegations" in the instant action to paragraph 277 in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS).

90. By omission, Mr. Hughes also fails to identify "matching allegations" in the instant action to allegations at paragraphs 37, 38, 44, 46, 47, 48, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 70, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 90, 92, 93, 94, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 120, 121, 122, 123, 125, 126, 130, 131, 132, 133, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 147, 148, 149, 150, 151, 152, 154, 156, 157, 158, 159, 160, 161, 162, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, and 175 in Joan Carol Lipin v. American

National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS).

91. Defendants have admitted by omission that the allegations of spoliation of evidence and tortious interference in the instant action at paragraphs 37, 44, 46, 57, 58, 60, 61, 62, 63, 64, 65, 68, 75, 77, 78, 79, 80, 81, 84, 85, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104 are not "matching allegations" to allegations in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 CIV. 4455 (LBS). (Hughes Aff., ¶¶ 9-11, Exh. E).

92. Defendants Bender and the American Red Cross in Greater New York admitted in Verified Responses to Interrogatories dated March 7, 1990 that (Exhibit R annexed hereto):

"Response to Interrogatory 21:

> (m) - (n) Following plaintiff's resignation, documents and files contained in plaintiff's office were disposed of as follows:
>
> Approximately one half of the documents and files were discarded. The remaining documents and files were integrated and commingled with ARCGNY's then newly created centralized management filing system. As a result, ARCGNY cannot identify which of its files were maintained by plaintiff while employed by ARCGNY."

93. Furthermore, defendant Fletcher admitted at her deposition on April 15, 1991 that she personally shredded, and discarded, approximately on half of my Red Cross documents and files shortly after my termination on February 5, 1988. (Fletcher Dep., 4/15/91, pp. 121-124, Exhibit S annexed hereto.)

94. Defendants Bender and Fletcher admitted to the spoliation of relevant evidence in this litigation despite their knowledge, as admitted by Mary Stanton, Administrator for Human Resources and named defendant in 92 Civ. 4455 (LBS), at her deposition taken on June 6, 1990, that I had discussed with her prior to my termination the possibility of a lawsuit by me. (Stanton Dep., 6/6/90.)

95. Defendants have also admitted by omission that allegations in the instant action at paragraphs 106, 107, 108, 109, 110, and 111 are not "related" to allegations in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS). (Id.).

96. Furthermore, defendants admit by omission that allegations in the instant action at paragraphs 113, 114, 115, 116, 117, 118, 199, 120, 121, 124, 127, 128, 130, 131, 132, 133, 134, 135, 136 are not related to allegations in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS).

97. Defendants further admit by omission that the derivative claims for waste, injury to and spoliation of property against the "individual defendants on behalf of the Red Cross, a corporation" (Amend. Complt. ¶ 139), Count IV, as alleged

in the instant action at paragraphs 138, 139, 140, 141, 142, 143, 153, 154, 155, 156, 157, 158, 159, 160, and 162, are not related to "matching allegations" in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455, and therefore admit that:

> "138. As a wrongfully terminated official of the New York Red Cross, plaintiff makes this claim against defendants for damages for waste, injury to, and spoliation of property in the form of the records, programs, contributions, and developments that plaintiff contributed to the Red Cross defendants while she was employed by them;"
>
> "139. Plaintiff also asserts this claim against the individual defendants on behalf of the Red Cross, a corporation;"
>
> "140. Plaintiff has previously requested that the Red Cross terminate defendant Bender because of his malfeasance and willful misconduct in office;"
>
> "141. Further demands by plaintiff that the Board of Trustees of the New York Red Cross take remedial action against defendants Bender and Fletcher and commence appropriate proceedings for the obstruction of justice, deliberate destruction of evidence, records and properties of substantial value and the victimization of plaintiff by acts of retaliation, sexual harassment and discrimination would be futile;"

"142. Such actions by defendants were part and parcel of a continuing conspiracy to retaliate against plaintiff for objecting to defendants' wrongful and discriminatory conduct and acts of sexual harassment;" and

* * * * *

"162. Plaintiff therefore claims damages on her own account and on behalf of the Red Cross as a corporation against defendants Byrne, Desch, Bender and Fletcher to recover damages for waste, injury to and spoliation of property, assets, and valuable programs and systems belonging to the Red Cross, and needed by the Red Cross for the proper performance of its Disaster relief and health services functions." (Id. ¶ 162.)

98. Mr. Hughes admits by omission in his affidavit, and fails to provide "matching allegations" in Exhibit E of his affidavit in the instant action at paragraphs 164, 165, 166, 167, 168, 169, 170 Counts V and Counts VI, alleging retaliation under the Human Rights Law of the State of New York and retaliation under the Administrative Code of the City of New York, to "matching allegations" in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS), thereby admitting that the "core facts" and "legal claims" are not the same.

99. At paragraph 10 (iv) of his affidavit, Mr. Hughes incorrectly and falsely states that the "core facts and legal claims" alleged in Count VII, "Quantum Meruit and Unjust Enrichment" at paragraphs 172(a-q), 173, 174, 175, 176,

177, 178, 179, 180, 181, 182, and 183 in the instant, are "breaches of contract (labeled quantum meruit in Lipin III)."

100. A quantum meruit claim goes to lost compensation for my inventing, creating and developing innovative systems and health programs, for the benefit of the Red Cross defendants, for which I was deprived economic benefits, and for whom the Red Cross defendants were unjustly rewarded and enriched. (Hughes Aff. ¶ 10 (iv).)

101. Notwithstanding, Mr. Hughes can not deny that the "core facts" and "legal claims" at paragraphs 172(a-q), 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, and 183 in the instant action are not "matching allegations" to and have no counterpart in paragraphs 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, and 258 in Joan Carol Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer, and Jesse D. Wolff, 92 Civ. 4455 (LBS):

> "172. The Red Cross defendants requested that plaintiff invent, create and develop innovative systems and health programs, for its benefit including, without limitation:
>
> (a) The first Board-approved and implemented cost accounting system and proposed program budgeting process for the New York Red Cross;
>
> (b) The Reconfiguration Model for Health Services and Marketing including Health Education, Safety Training and Injury Prevention, Community Health Programs, and Community Outreach (Hispanic) Departments,

design, development and implementation of new AIDS education and prevention programs, and preliminary design of an AIDS model education program for New York State Parolees in conjunction with the New York State Parole System;

(c) New health education, safety training and injury prevention, community health, and community outreach programs;

(d) The development of contract and grant proposals for new programs which resulted in the securing of the largest total amount in grants and contracts for the Health Services and Marketing Division of the New York Red Cross to that time;

(e) The design and development of Strategic Initiatives programs for the New York Red Cross as approved by the Executive Board;

(f) The Strategic Marketing Plan for the New York Red Cross;

(g) The Strategic Planning Process for the New York Red Cross;

(h) The first International Public Health Conferences with the Swedish Public Health Council of Stockholm and Gothenberg Sweden and the New York Red Cross;

(i) The Incentive Compensation Program for the newly established Marketing Department with team incentive formulas;

(j) The Executive Health Services Working Volunteer Committee procedure and the Executive Marketing Working Volunteer Committee;

(k) The first Strategic Planning goals and objectives for the New York Red Cross;

(l) The Volunteer and Training position and program for the New York Red Cross;

(m) The operational and organizational policies and procedures for the New York Red Cross;

(n) The creation of job descriptions for seventy positions designed and developed to reflect long term strategic goals and objectives and professional development for the New York Red Cross;

(o) The initiation of joint inter-agency discussions for health programs with New York City Health Department and the New York Business Group on Health;

(p) The first Task Force for the Code of Conduct and Intellectual Property Document for Safety Trainers and Safety Instructors for the New York Red Cross;

(q) The Task Force to Evaluate the Regional Sales Territory with Contiguous Chapters to Determine Uniform Pricing."

"173. As requested, plaintiff did invent, create and develop such accounting, financial, budgeting, strategic marketing and planning initiatives, health programs, policies and procedures for the benefit of the Red Cross defendants."

"174. No part of the compensation received by plaintiff reflected the value of such new systems, programs and intellectual properties invented, created, initiated and/or developed by plaintiff."

"175. At the time plaintiff invented, created and developed such accounting, financial, budgeting, marketing and strategic planning goals and objectives, health programs, policies and procedures plaintiff's compensation was based exclusively upon her administrative functions and did not include any remuneration for the invention, creation and development of accounting, financial, budgeting, marketing and strategic planning systems and health services programs."

"176. At the time that plaintiff was with the New York Red Cross, no other executive participated in the invention, creation or development of any significant systems or programs for the Red Cross."

* * * * *

"178. The Red Cross repeatedly promised and assured plaintiff that she would receive additional compensation for the

invention, creation and development of accounting, financial, budgeting, marketing and strategic planning systems, health services and programs, policies and procedures utilized by the Red Cross for its benefit, but no such compensation has been received by plaintiff."

"179. The Red Cross adopted policies and procedures to encourage the initiation and development of such systems and programs in order to "stimulate all Red Cross personnel to seek new horizons of creativity and to fuel our unified drive towards excellence."

"180. As part of its program to encourage the development of such intellectual properties, the Red Cross explicitly mandated appropriate recognition and incentive compensation for the creators of productive accomplishment."

* * * * *

"183. Plaintiff has been injured by not receiving the fair value of her services, inventions and programs created by her as stated above, and defendant Red Cross has been unjustly enriched by receiving the benefits of the systems and programs developed by plaintiff pursuant to its requests. The reasonable value of plaintiff's claim therefor is $5,000,000.00, or such further and additional amount as shall be proved at trial.

102. Attorney General Janet Reno in addressing the American Bar Association's Invitational Conference on Civil Rights on April 30, 1993 (CCH, Report 470, May 17, 1993, p. 1), stated that:

> "... failure to vigorously protect the civil rights is an intolerable breach of faith with the people who have entrusted tremendous power in their government."

WHEREFORE, my cross-motion to disqualify the law firm of WGM should be granted, and defendants' motion for a stay should be denied in the interest of justice (TR 12/3/93, p. 15):

> "THE COURT [Judge Sand]: You know, what I tried to suggest at some point is that a great deal of time, effort, energy, money is being spent on matters unrelated to the merits of the plaintiff's sex discrimination case and whether some thought should not be given to the fact that that is so-and-so that one might move forward on the underlying merits of the claim." (Emphasis added.)

Respectfully submitted,

/s/

Joan Carol Lipin

Sworn to before me this

17th day of June, 1993;

/s/

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

- against -

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF,

Defendants.

92 Civ 4455 (LBS)

AFFIDAVIT OF JOAN CAROL LIPIN IN SUPPORT OF PLAINTIFF'S MOTION TO DISQUALIFY JUDGE AND COUNSEL FOR DEFENDANTS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

1. I am the plaintiff in this lawsuit filed in this Court to redress sexual harassment and other injuries inflicted upon me by Robert M. Bender, Jr., the Chief Executive Officer of the New York Red Cross, while I was the highest-ranking female employee with the New York Red Cross, and thereafter in retaliation for the assertion of my charges of sexual harassment and other violations of my constitutional and civil rights.

2. This affidavit is respectfully submitted in support of my motion to Judge Leonard B. Sand to recuse and disqualify himself (a) from further participation in this proceeding because of prejudice and bias and inability to act impartially; (b) for a new hearing on the motion denied on October 29, 1992, issued by Judge Sand on July 7, 1992; and (c) for findings of fact and conclusion of law on the issues raised in that motion.

3. My attorney filed suit in this Court on June 17, 1992, as is legally permitted, to have my verififed complaint decided by this Court. I filed an amended verified complaint on June 23, 1992.

4. The verified complaint filed on June 17, 1992, and amended verified complaint filed on June 23, 1992, include not only claims of sexual harassment and discrimination but also claims for the deception and misconduct of defendants' attorneys, who are named defendants, in violation of Section 487 of the New York Judiciary Law and 42 U.S.C. § 1986.

5. At the hearing on October 29, 1992, Judge Sand took the side of Justice Moskowitz on the issue of her recusal on August 6, 1992, and his comments in that regard evidently were made with the purpose and effect of creating prejudice against me in the New York Court on that and other issues.

6. Such statements were made at the behest of defendants to enable them to use the statements of Judge Sand prejudicially against me in the New York Court in such further proceedings in that court, as were contemplated when the statements were made.

7. Judge Sand's actions and comments were obviously designed to influence the New York Court (a) to entertain such further proceedings intended to harass and

penalize me and my attorneys, and (b) to extend the prior Orders of Justice Moskowitz in the guise of re-interpretation in a manner which would interfere with and make it impossible for me to proceed with the prosecution of this litigation commenced in this Court in the exercise of my constitutional right to petition for a redress of grievances.

8. Judge Sand issued a stay for that same purpose on July 7, 1992, even though he admittedly had not even read my verified complaints, and solely relied on defendants' papers, including affidavits of defendants' attorneys, Lawrence J. Baer and Mark A. Jacoby, which are admittedly not only incorrect but self-contradictory, and whose statements were falsely attested to by them as being based on personal knowledge.

9. Judge Sand stated at the impromptu Order to Show Cause session brought on by defendants on July 7, 1992, at a time when they knew that the attorney in charge of my case was away from New York on vacation (TR 7/7/92, p. 2, Exhibit A annexed hereto):

> ""THE COURT: Let me, for your benefit, tell you that I have read your [defendants'] memorandum of law, I have read the decision of Justice Moskowitz, I have read your [defendant Mark A. Jacoby] affidavit and the affidavit of your associate [defendant Lawrence J. Baer], and I have not read the complaint." (Emphasis added.)

10. To my direct knowledge, numerous statements used in the affidavits by defendants' counsel, Mark A. Jacoby and Lawrence J. Baer, to obtain the Order to Show Cause and stay issued herein on July 7, 1992, are false, and constitute perjury.

11. Nevertheless, despite the fact that such circumstances were brought to the attention of Judge Sand on October 29, 1992, together with a substantial showing such further proceedings in the New York Court would inflict substantial and irreparable injury to me, Judge Sand refused to consider this evidential information as a basis for vacating the stay, and denied my motion in an endorsement Order dated October 29, 1992, a copy of which is annexed hereto as Exhibit B.

12. Judge Sand also failed to consider or make findings regarding my motion to disqualify the law firm of Weil, Gotshal & Manges from acting as attorneys for defendants herein.

13. During the argument on October 29, 1992, on the motion to vacate the stay, Judge Sand erroneously quoted the State Court Order to turn over the documents and make no use of them "in the interim [**10** days]" (emphasis added) by **omitting** the phrase, "in the interim," a phrase which puts substantial limitation on the scope of the New York Court Order that was issued on January 9, 1992.

14. Such omission by Judge Sand stems directly from repeated misquotations and mischaracterizations by defendants' attorneys of the same order in the same fashion.

15. Such misquotation and mischaracterization by Judge Sand occurred even after he had been apprised of its inaccuracy and was evidently done by Judge Sand to coach the New York Court, and influence it as to what Judge Sand's own views were.

16. Judge Sand, on October 29, 1992, gave my attorney no opportunity to put forward his case, which he had been unable to do on July 7, 1992, because he was away on

vacation when defendants brought their Order to Show Cause, and repeatedly interrupted my attorney by remarks which included prejudicial phrases such as "purloined" documents and excluded the limiting phrase to the scope of the state court order "in the interim," even though he had been apprised of their inaccuracies.

17. Judge Sand made no attempt to decide or even refer to my requests for disqualification of defendants' attorneys on the basis that (a) they are co-defendants, (b) have submitted perjured affidavits in support of their initial stay request, and (c) are necessary witnesses.

18. By doing so, Judge Sand squarely placed himself on the side of defendants without warrant or reason.

19. In hearings, mien and attitude Judge Sand has clearly deferred to and favored defendants for reasons not given that I believe stem from extrajudicial sources including (a) dislike of a second cousin of mine, Marc Rich, who has been extensively involved in litigation before him, (b) an unwillingness to become involved in a case where one of the conflicts of interest is the conduct of defendants' attorneys who are named defendants, and (c) an undisclosed bias to shield the Red Cross, a disaster relief organization, from the light of public and judicial scrutiny, especially regarding large sums money missing from the accounting records of defendant New York Red Cross, which occurred at a time when the Chief Executive Officer who had sexually harassed me deliberately refused to follow my recommendations for the safe-guarding of such funds shortly before my termination and insisted on setting up a double set of books so as to be able to mislead the public by giving them a financial picture that was inconsistent with what is shown in the financial reports used by the Red Cross for internal purposes.

20. The results and indications of such bias are evident to me and have been manifested in ways prejudicial to the progress of my case.

21. The statistics support the existence of such bias or prejudice.

22. The law firm that represents me contains three attorneys and one recent law school graduate who is awaiting bar examination results.

23. Only one of the three attorneys has been a lawyer for more than three years; one was admitted in July 1990, and the other one was admitted just this year,

24. In contrast, I am informed that the Goliath law firm of Weil, Gosthal & Manges contains more than two hundred times as many experienced attorneys.

25. The likelihood that in a major law firm of so many lawyers a number of them would be personal friends of the judges in courts in New York City is extremely high.

26. Such judges would consciously or subconsciously avoid deciding issues that would result in the embarrassment of or disqualification of such a law firm according to the rules of statistical probabilities.

27. There is no rational explanation for the failure of the Judges involved in my case, including Judge Sand, ever to rule on my motions for the disqualification of the attorneys of Weil, Gosthal & Manges who have been my tormentors.

28. Accordingly, I firmly believe that Judge Sand can not conduct this matter impartially.

29. The result has been to facilitate defendants' ability to initiate further New York Court proceedings, even though such further New York Court proceedings were not proper, in order to

(a) suppress a federal action, contrary to law;

(b) permit defendants' attorneys to continue to represent the other defendants despite

(1) disqualification therefrom for severe conflicts of interest;

(2) perjured affidavits and submissions; and

(3) disqualification of defendants Jacoby and Baer as necessary witnesses, a situation that should have been immediately investigated and ruled upon by Judge Sand, but was not and has never been, before any action was taken on the stay request; and

(c) by the parroting by Judge Sand of the inaccurate characterizations by defendants' attorneys Kevin P. Hughes, his partner and named defendant Mark A. Jacoby, and Jacoby's associate and named defendant Lawrence J. Baer as to the nature and status of the Disputed Documents.

30. All of the above has taken place while my attorney and I have been held strictly and rigorously to account,

penalized, impeded and prejudiced unlike the undeserved deference in the freedom of status and action granted defendants and their attorneys who have been licensed by Judge Sand maliciously to inflict upon me their retaliatory acts by bogging my case down in an improper endless further proceeding in the New York Court.

31. I am advised that recusal is appropriate when a judge expresses a personal bias concerning the outcome of the case at issue.

32. I am also advised that conduct on the part of the judge which arises from something outside of the courtroom proceeding itself is considered in making the determination of whether a reasonable person, knowing all the facts, would conclude that the court's impartiality might reasonably be questioned.

33. Based on those standards, I have concluded that Judge Sand has personal bias or prejudice against me and in favor of my adversaries.

34. The facts and reasons for such belief on my part based upon the Transcripts of the sessions on July 7, 1992, and October 29, 1992, copies of which are annexed hereto as Exhibit A and C, respectively, are set forth below.

35. In the statements quoted below, words indicative of bias and prejudice on the part of the judge are quoted in bold faced type.

A. STATEMENTS INDICATIVE OF BIAS OR PREJUDICE REGARDING OUTCOME OF THE STATE PROCEEDING

36. "THE COURT: **The issue of what was meant by 'make no use of them in the interim,' obviously, it was not in the Justice's contemplation that the use would be made across the street in this Court.**" (Exhibit C, p. 17.)

37. "THE COURT: I should note that the record indicates that following Miss Lipin's obtaining of these documents, **plaintiff sought to obtain a settlement of the action by the defendants, during which settlement discussions they made use of what I shall, for want of a better term, call the purloined privileged documents.**" (Exhibit A, p. 28.)

38. "THE COURT: **It is undisputed that the original complaint and the amended complaint both contain information derived by plaintiff and her counsel from the purloined privileged papers.**" (Exhibit A, p. 29.)

39. THE COURT: "Plaintiff's counsel takes the view that Justice Moskowitz' order precluded utilization of the documents themselves but did not preclude utilization by the plaintiff or her counsel of the information derived from those documents. **The Court believes that to be an extraordinary view of the consequences of a privilege and one which would significantly diminish the meaning of the privilege.**" (Exhibit A, p. 29.)

40. "THE COURT: If the defendants are correct in their view that the utilization by plaintiff and her counsel of **the purloined privileged papers** in preparation of the complaint in this court is a violation of Justice Moskowitz' order, then, as a matter of comity, **this Court should enable the tribunal**

issuing the order to interpret and enforce it." (Exhibit A, p. 30.)

41. **"THE COURT: We believe that if, as is alleged with considerable persuasiveness, the filing of the complaints utilizing the privileged documents 'taken' by Miss Lipin was a violation of Justice Moskowitz' order, the filing of the complaint in and of itself would irreparably injure the defendants."** (Exhibit A, pp. 31-32.)

B. STATEMENTS INDICATIVE OF BIAS OR PREJUDICE CONCERNING PROPRIETY OF THE STATE PROCEEDING

42. **"THE COURT: And she'll decide that on November 18th.** On November 18th, Justice Supera [Ciparick] will decide whether it is properly before her or whether, similar to Justice Fingerhood, **she should say there's only one Supreme Court Justice who can hear this matter and that is Justice Moskowitz; right?"** (Exhibit C, p. 5.)

43. "THE COURT: Indeed, repeating, **the plaintiff has been unable to show any prejudice that will result from a delay of this action."** (Exhibit A, p. 32.)

44. In fact no opportunity was ever provided for plaintiff to do so, and when she did in detail, with her motion dated October 6, 1992 (Aff. ¶¶ 35-51), such showing was disregarded.

45. **"THE COURT: But all that's going to take place approximately three weeks from now.** And why does any of that in any way impact on the reasons **which led this Court to say that the State Court should interpret the full implication of the previous orders issued by the State Court,**

which were not orders prohibiting recourse to the Federal Court, but were orders directing the return of certain documents and that no use be made of them and dismissing the State Court action?" (Exhibit C, p. 6.)

46. "THE COURT: Now, what the State Court meant when it directed that return **and directed that there be no use made of those documents** is also a matter for the State Court." (Exhibit C, p. 16.)

47. "MR. WISEHART: Now, this was not a situation in which the defendants sought to make any change in the orders as written, although they had an opportunity and, in fact, on the ancillary order, at their suggestion, changes were made.

THE COURT: **Why should they? I mean --**" (Exhibit C, p. 17.)

48. "THE COURT: And again and I say this seriously to you, I would think there would be overwhelming benefit in the interests of plaintiff's counsel to know whether the state court regards the filing of this complaint in this court to be a violation of its order, **because if it is, then I suspect the next inquiry will not be before this tribunal but will be before a grievance committee.**" (Exhibit A, p. 20.)

C. STATEMENTS INDICATIVE OF BIAS OR PREJUDICE CONCERNING MERITS OF THE STATE PROCEEDING

49. "THE COURT: Do you know of any other area in the law in which a violation of the privilege permits the **person who has gained the information in violation of the privilege to utilize that information.**" (Exhibit A, p. 15.)

50. THE COURT: "But let me refresh my recollection. Tell me, were you given the opportunity in state court to restate the complaint without utilization of what we refer to as the **purloined privileged papers**? Tell me what the procedural posture was prior to the dismissal of the state court action." (Exhibit C, p. 8.)

51. THE COURT: "The question whether the filing in this Court of a complaint which, at least, to the extent of reference to the **purloined privileged papers** is conceded to reflect the plaintiff's access to the **privileged** documents. Whether that action constitutes a violation of the State Court's order that plaintiff not utilize that material is also a question, which is best interpreted by the State Court which issued the order." (Exhibit C, p. 25.)

52. "THE COURT: **A settlement conference was held before a state judicial officer. Miss Lipin had physical access to documents which were on the desk of defendant's counsel.** She read those documents, and she put them in her briefcase and took them with her. Justice Moskowitz characterized her conduct as egregious, and I don't think it's appropriate for this Court to elaborate on that characterization." (Exhibit A, p. 27.)

53. "THE COURT: And a further issue, whether the preparation and the filing of the complaint in this court was a violation of Justice Moskowitz' order that the plaintiffs returned [sic] and make no use of the **purloined privileged documents**." (Exhibit C, p. 14.)

54. "THE COURT: **There is an explicit direction from a Supreme Court Justice that 'you are not to do anything with that material.'**" (Exhibit A, p. 8.)

55. "THE COURT: **Contrary to the direction that you are not do to anything with that material, you indeed do something with that material; you embodied it in the complaint which is filed in this court.**" (Exhibit A, p. 9.)

56. "THE COURT: The issue is whether the filing of the complaint in this fashion is a violation of an explicit direction by a court having jurisdiction to your firm **not to make any use of certain materials.**" (Exhibit A, p. 10.)

57. "THE COURT: You know, it's not my role to give advice to plaintiff's counsel, but I have a strong feeling that if I were sitting where you are seated rather than where I am seated, I would be very anxious to have a definitive determination whether Justice Moskowitz' order was valid **before I proceeded in the fashion which might constitute blatant contempt of Court.**" (Exhibit A, p. 10.)

58. "THE COURT: **It may not be visible, but I am showing great restraint at conduct which Justice Moskowitz categorized as egregious.**" (Exhibit A, p. 18.)

59. "THE COURT: I cannot avoid the comment that I am perplexed in trying to understand why plaintiff's counsel resists this order, why it would not be clearly in their benefit **to have a ruling by the state court whether they are or are not able to proceed in the fashion in which they propose before they continue on a course which makes, in this Court's view, very significant, indeed, the claim of the defendants that Miss Lipin and her counsel are guilty of civil and criminal contempt.**" (Exhibit A, p. 32.)

60. "MR. WISEHART: You were told that the defendants were going to go into the state court and have us held in contempt.

THE COURT: Which would be the mechanism to obtain an interpretation of the question, whether the filing of the complaint in this court was a violation of **the State Court's order to return and make no use of the documents.**" (Exhibit C, p. 15.)

61. "THE COURT: * * * **this Court has very strong views as to the propriety of Miss Lipin's conduct. . . .**" (Exhibit A, p. 31.)

D. STATEMENTS INDICATIVE OF BIAS OR PREJUDICE CONCERNING RECUSAL OF THE STATE JUDGE

62. "THE COURT: One is that Justice Supera [Ciparick] will say I have to proceed to resolve this because one can't compel Justice Moskowitz to resolve it and, therefore I will resolve it, or she will refer again to Justice Moskowitz, **who will then have occasion to revisit her recusal, which is a very unusual recusal for very unusual reasons.** Or there will be a complete vacuum and the consequences of that, as a matter of state law, I surely don't know." (Exhibit C, pp. 5-6.)

63. "THE COURT: The circumstances that a different Supreme Court Justice of New York County may preside over the matter does not alter the circumstance. **When one reads the proceedings before Justice Moskowitz and one reads her order for stating why it was that she felt compelled to recuse herself, one would find it particularly inappropriate to utilize that circumstance for the benefit of the plaintiff.**" (Exhibit C, p. 24.)

E. EVIDENCE OF BIAS OR PREJUDICE IN FAVOR OF DEFENDANTS IN REFUSAL TO STRIKE PERJURED ATTORNEYS' AFFIDAVITS USED TO PROCURE ORDER TO SHOW CAUSE

64. "MR. WISEHART: Here is a submission of an affidavit in this court by counsel for the defendants, in which it stated incorrectly that the affidavits that were repudiating the factual statements in the earlier affidavits that caused the State Court to issue its order --

THE COURT: I'm familiar with your argument,

MR. WISEHART: In that particular case, your Honor, we submit that the linchpin of the order to show cause, as revealed on the record, namely, these affidavits must be disregarded and stricken.

THE COURT: All right, sir. I understand your argument on that grounds." (Exhibit C, p. 23.)

F. STATEMENTS INDICATIVE OF BIAS OR PREJUDICE CONCERNING PROSECUTION OF THE STATE PROCEEDINGS

65. THE COURT: "The plaintiff, appealing from the dismissal of the complaint, **has not been proceeding expeditiously**, although the Court recalls that when the parties were last before the Court, this Court noted that the time table of that appeal was largely a function of **how still gently the plaintiff proceeded in the perfecting of that appeal**. To the extent that the matter has been delayed, that is the matter of a State Court resolution of these two threshold state law issues and has been proceeding less expeditiously than was anticipated in July. **It would appear that the responsibility for such**

delay lies squarely with the plaintiffs." (Exhibit C, p. 26.)

66. "THE COURT: We note that plaintiff's counsel waited six months between Justice Moskowitz' order dismissing the action and the commencement of the case in this court. **We note also that it was within the power and ability of plaintiff's counsel to perfect the record on appeal from Justice Moskowitz' order months and months ago."** (Exhibit A, p. 30.)

67. Such statements can only have been intended to poison the record to create prejudice against me in the New York Court.

68. The filings made on my behalf were timely and made against a background of direct interference deliberately made by defendants' counsel to cripple or destroy the law firm representing me, as a means of making it impossible for me to continue to litigate my claims.

69. Lawrence J. Baer of Weil, Gotshal & Manges directly threatened to destroy this firm and put the lawyers in it out of work shortly after the Notice of Appeal of the decision of the New York action was filed - substantially before the time when it was due to be filed.

70. Baer's threat was made to Michael Prince, an associate of the firm, and was intended to, and did, create a severe and continuing morale problem among the staff.

71. Within months thereafter, half of the legal staff of Wisehart & Koch had departed, during a period of intense trial activity.

72. The firm was able to push forward notwithstanding and file both the complaint and amended

complaint in this Court substantially before any such filing would have been required.

73. The subsequent extensive filings in connection with this action and connection with the New York action have been completed on a timely basis by straining the resources of the firm to the uttermost, a condition that was aggravated by the tolerance of Judge Sand and Justice Moskowitz of the abusive and improper resort to Order to Show Cause practice by Weil, Gotshal & Manges.

74. Judge Sand signed the Order to Show Cause in this and forced the "hearing" on it to go forward on the same day notwithstanding his knowledge of the unavailability of the attorney knowledgeable about my case.

75. Subsequently, on October 29, 1992, Judge Sand caused additional prejudice by adverse and biased comments, treating a non-hearing on July 7 as a "hearing," and my motion dated October 6, 1992, the first time the issues on the merits could be addressed by my counsel on the merits with an opportunity to respond to defendants' contentions and present opposing papers, as merely a "rehearing," (Exhibit C, p. 2), and caused further prejudice, contrary to the papers submitted on my behalf, by stating that "it is conceded" that the complaint filed in this action "utilizes the material that was the subject that was the subject of Justice Moskowitz's order to return." (Exhibit C, p. 12.)

76. Prejudice is also shown by Judge Sand's statements that on July 7, when the Order to Show Cause was signed, and the stay granted, "the fact that an associate appeared from your office who disclaimed familiarity with respect to some of the matters which are the subject of the Court's questioning and stated that you were on vacation, **that's a circumstance which is not the responsibility of the Court.**"

(Exhibit C, p. 8.)

77. It is the responsibility of the Court to see to it that a fair opportunity for a hearing is given.

78. It was the Court's own decision that forced a two year associate unfamiliar with the case to go forward on the merits of an Order to Show Cause signed the same day shortly after the July Fourth weekend, when Mr. Wisehart was known to be away, and unavailable, with regard to an application that the litigation team of defendants' law firm had had weeks to prepare, following the filing of my complaint on June 17, 1992, and about which they clearly had ample time to pursue by using normal motion practice, as I am informed they are required to do under this Court's usual rules.

79. The abusive procedures employed by defendants' lawyers in obtaining the Order to Show Cause from Judge Sand without giving my lawyers a decent opportunity to be heard were aggravated by the fact that the lawyers from Weil, Gosthal & Manges obtained the Order to Show Cause by the use of false and perjured affidavits, and were subject to the mandatory disqualification under applicable Disciplinary Rules, according to information given to me.

80. I demonstrated the falsity of the affidavits used by the Weil, Gotshal & Manges attorneys in my affidavits to this Court sworn to October 6 and 28, 1992.

81. However, despite the showing of egregious misconduct on the part of attorneys of Weil, Gotshal & Manges, in improperly obtaining the Order to Show Cause by false and fraudulent statements on July 7, 1992, the same Judge who unfairly accused my attorneys of delay, remained silent about the deliberate misconduct by attorneys for defendants that had been brought to Judge Sand's attention.

82. The obvious purpose of Judge Sand is to create a record that will enable him to inflict further criticism upon me and my attorneys in the future on account of his prejudicial statement that the extrajudicial New York Court proceeding that is the brain-child fathered by the Weil, Gosthal & Manges attorneys as facilitated by Judge Sand, "has not been proceeding expeditiously" (Exhibit C, p. 25), as an excuse to be used in the future for denying me a remedy in this Court for the violation of my constitutional and civil rights.

83. The strange silence of Judge Sand regarding the derelictions and misconduct of the Weil, Gotshal & Manges lawyers, who have openly threatened to destroy the law firm representing me, includes his failure to act upon and make findings regarding my motion to disqualify that law firm as presented by my motion dated October 6, 1992.

84. Although Judge Sand acknowledged that he was aware of that request for relief against the attorneys who

improperly obtained the Order to Show Cause so as to trigger an improper state proceeding to cause further punitive action and irreparable injury to me (Exhibit C, pp. 2 & 7), but failed to make findings and rule on that issue.

85. Despite my attempts to obtain a ruling on the disqualification issue, going back to my cross-motion before Justice Moskowitz dated October 23, 1991, my repeated pleas for a ruling on that issue has been greeted by a conspiracy of silence on the part of the judiciary, including both Judge Moskowitz and Judge Sand.

86. Judge Sand further indicated extrajudicial bias against me, or in favor of the Weil, Gosthal & Manges attorneys by making it clear, at the hearing on October 29, 1992, that he sympathized with Justice Moskowitz and

impliedly criticized me and my attorney for obtaining the recusal of a State Judge (Exhibit C, p. 6: "... or she will refer [it] against to Justice Moskowitz, who will then have occasion to revisit her recusal, which is a very unusual recusal for very unusual reasons.") (Emphasis added.)

87. I continue to be firmly of the view that the behavior of Justice Moskowitz in relation to me was an outrageous instance of bias and prejudice, not the least of which was caused by her absolute refusal to consider or rule on my cross-motion to disqualify Weil, Gosthal & Manges.

88. The refusal of Judge Sand to make findings and a determination on that issue, and his attempt to excuse Justice Moskowitz for similar behavior, indicates to me that both judges are subject to extrajudicial bias and prejudice, with against me or in favor of my adversaries or their attorneys.

89. In such circumstances and for all the other reasons set forth above, the impartiality of Judge Sand "might reasonably be questioned." He therefore is requested to disqualify himself pursuant to 28 U.S.C. § 455(a), as well as 28 U.S.C. § 144 and 455(b).

90. It is further requested that my motion dated October 6, 1992, be assigned to another Judge for a findings of fact and conclusions of law with respect to the issues raised therein.

Respectfully submitted,
/s/

Joan Carol Lipin

Sworn to before me this
13th day of November, 1992:
/s/

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

- against -

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF,

Defendants.

92 Civ. 4455 (LBS)

REPLY AFFIDAVIT OF JOAN CAROL LIPIN (Corrected)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action.

2. This affidavit is respectfully submitted on the basis of personal knowledge in reply to the affidavit of Kevin P. Hughes, attorney for certain defendants (not including the American National Red Cross), sworn to November 30, 1992.

3. Since the Hughes affidavit (¶ 1) and the accompanying memorandum by Mr. Hughes' firm, Weil, Gotshal & Manges, does not purport to be submitted on behalf

of defendant American National Red Cross, that organization has declined to take a position on my motion for recusal, and other relief.

4. The pattern of falsity established by the Baer and Jacoby affidavits previously submitted to this Court in obtaining the Order to Show Cause and ensuing State dated July 7, 1992, is continued and perpetuated by the Hughes affidavit.

5. Paragraph 3 of the Hughes affidavit asserts that it is intended merely to put my motion "into context" by describing the procedural background.

6. After referring to several procedural developments, without providing appropriate citations, the Hughes affidavit puts forward its major thrust, that by efforts to secure relief from the judicial system for the repeated violations of the Code of Professional Responsibility by defendants' counsel were "all intended to divert attention" from my own purported misconduct (Hughes Aff. ¶ 3).

7. Deliberately ignored in the recitation of procedural developments is the improper use of false affidavits by attorneys in Mr. Hughes' firm in order to obtain from this Court the Order to Show Cause and stay granted on July 7, 1992, with no opportunity to respond by my counsel.

8. The lack of due process and prejudice caused by their actions in that connection is shown in the affidavit of Michael H. Prince submitted herewith.

9. The affidavit of Mr. Hughes states "plaintiff cross-moved on July 8, 1991 to strike defendants' answers and to disqualify defendants' counsel based upon their purported misconduct." (Hughes Aff. ¶ 4.)

10. In fact, the actual date of my motion was not July 8, 1991, but May 2, 1991.

11. The significance of the falsity of the Hughes affidavit is that the Disputed Documents had not become an issue, as they had not made their appearance as of May 2, 1992.

12. The incident invoking the disputed documents occurred on June 28, 1991, after the date of my cross-motion.

13. The choice of a file date subsequent to appearance of the Disputed Documents in his affidavit was a deliberate falsity sworn to by Mr. Hughes as he undoubtedly had the cross-motion papers available to him when he was preparing his affidavit.

14. Since the cross-motion occurred before the incident involving the Disputed Documents, the assertion sworn to in Mr. Hughes' affidavit that it was intended to "divert attention" was demonstrably false.

15. What the cross-motion of May 2, 1991 was intended to do, as is shown in the Memorandum of Law of that date that is annexed hereto as Exhibit A, makes clear, is to supply a remedy to discovery misconduct which the law firm of Weil, Gotshal & Manges has been active participants going back at least to discovery requests dated May 11, 1990 which Justice Moskowitz had previously ordered the defendants to produce three times. (Mem. p. 6.)

16. Thus the cross-motion to strike of May 2, 1991, is the outgrowth of a pattern or practice involving deliberate and willful violation of discovery orders of the New York Court that had gone on for nearly a year.

17. Noteworthy in such discovery abuse was the involvement of Weil, Gotshal & Manges in aiding and abetting Barbara Fletcher, defendant Bender's former assistant, in becoming a fugitive from her deposition scheduled to occur in New York by permanently departing for California only two days beforehand, without notice, and retaining and arranging for the Red Cross to pay California counsel, to participate in the further obstruction of justice by her during the course of her deposition in California, including outrageous abuse of the deposition by repeated assertions that she couldn't remember recent events. (Mem. p. 10.)

18. Also involved in the obstruction of justice was flagrant tampering with the evidence by a senior Red Cross attorney who submitted a false affidavit as to information needed to ascertain the whereabouts of Fletcher, as described in paragraphs 39-48 of the affidavit of Arthur M. Wisehart dated May 2, 1991, annexed hereto as Exhibit B.

19. The central role of Barbara Fletcher in the conspiracy involving defendants' obstruction of justice is shown by Fletcher's admission in her deposition in California more than a year it had been noticed, that in her capacity as a Red Cross employee, "I destroyed many pieces of paper that were in Joan Lipin's office post her termination of employment at the American Red Cross in Greater New York. (TR pp. 120-123.)

20. At the time Barbara Fletcher shredded the documents relevant to my performance as a high-level Red Cross employee, and twice appointed Acting [General] Manager, she was Bender's assistant who was at the same time openly and notoriously carrying on an affair with him.

21. Such deliberate destruction of evidence by Fletcher, acting as the agent of defendant Bender, included the

shredding of many documents of great significance and importance to the proper functioning of the Red Cross, including its financial affairs.

22. The destroyed documents would show, in fact, because of the failure and refusal of Bender and others under his direction at the Red Cross to follow my recommendations regarding accounting procedures and program budgeting, that the financial affairs of the Red Cross had been egregiously mishandled, and continue to be.

23. The obstruction of justice perpetrated by defendants with the connivance of attorneys at Weil, Gotshal & Manges was not merely passive.

24. Fletcher admitted in her deposition that, after Fletcher absconded from New York, just in advance of her scheduled deposition, defendant Bender and his attorney Baer had been communicating with her on a continuing basis, during the period while she was in California, during which period my attorneys were unable to locate Fletcher for the purpose of her deposition.

25. Bias and prejudice by Judge Sand is also shown by his permitting counsel for defendants to file scandalous and defamatory affidavits about me and the Disputed Documents in the public record in this proceeding at the same time that he has sealed my complaint against defendants without ever examining them, so that he has deliberately remained unaware of the nature of my contentions, and denied me due process.

26. The eight affidavits that defendants' counsel have filed in this litigation and in the State Court Action are all matters of public record in the public files of the courts, as is the transcript of the hearing before Justice Moskowitz.

27. The affidavits of defendants' counsel as filed in the public record are as follows:

Lawrence J. Baer - 7/3/91 (Filed by defendants here and in the State Action)

Mark A. Jacoby - 7/3/91 (Filed by defendants here and in the State Action)

Mark A. Jacoby - 10/29/91 (Filed by defendants in the State Action)

Mark A. Jacoby - 2/3/92 (Filed by defendants in the State Action)

Mark A. Jacoby - 7/7/92 (Filed by defendants here and in the State Action)

Mark A. Jacoby - 7/10/92 (Filed by defendants in the State Action)

Lawrence J. Baer - 10/23/92 (Filed by defendants here)

Kevin P. Hughes - 11/30/92 (Filed by defendants here)

28. The extensive filing of such false and defamatory affidavits in the public record by defendants' counsel also shows that the circumstances involving the Disputed Documents are referred to repeatedly in the public court records.

29. The references to the documents in my Amended Verified Complaint are consistent with and do not go beyond the references to the documents which defendants' counsel themselves voluntarily placed in affidavits filed by them in public court records.

30. Defendants cannot have it both ways. When their counsel files affidavits in the public records repeatedly referring to the documents for the scandalous purpose of further defaming me, in the most injurious way possible, by falsely asserting that the documents were "stolen," I believe that I am entitled to refer to the exact same information found in the public record pursuant to the rights given to me by Section 487 of the New York Judiciary Law for the purpose of making a claim against those same attorneys for their collusive acts to deceive the court, and me, as in fact I have done in Count II of my Amended Verified Complaint.

31. Defendants cannot repeatedly refer to the documents in their attorneys' affidavits filed in public records, and at the same time contend that the I cannot ever refer to the documents, for my own protection, and that an "air tight" suppression order must be imposed upon me by the State Court that would prevent me from responding to or asserting my claim for the misconduct of defendants' attorneys.

32. By obtaining an order sealing the complaint and amended complaint from this Court when my attorney of record was not present, defendants' counsel have demonstrated they know it is possible to seek such orders.

33. However, they never sought any such order with respect to the transcript of the hearing in the public record before Justice Moskowitz in my State Action, or the multiple false affidavits that they filed in this Court or in the State Court that refer repeatedly to the Disputed Documents in the context of defaming me.

34. There can be no question that the filing of the affidavits in the public record by defendants' counsel was "intentional and voluntary."

35. Mr. Jacoby falsely swears in paragraph 15 of his affidavit of July 7, 1992, filed in the public record of this Court and used to obtain the stay granted by it that "Plaintiff and her counsel have brazenly sought to continue to misuse the privileged information they wrongfully acquired, by commencing the instant action and adding as defendants your deponent [Mark A. Jacoby] and Messrs. Baer and Wolff, based upon information allegedly gleaned from the stolen Privileged/Work Product Documents. The most glaring example of the misuse of this privileged information ... is found in paragraph 267 of the Amended Complaint herein which purports to expressly incorporate by reference 'the defamatory statements in said [Privileged/Work Product] documents.'"

36. Mr. Jacoby continues to falsely swear at paragraph 16 that "Other allegations included in the Amended Complaint that are plainly based upon the contents of the stolen documents include, inter alia, those referring to the state of knowledge of various parties, including deponent, regarding matters covered by those Documents. These include the following paragraphs of the Amended [Verified] Complaint: 65, 68, 80, 91, 127, 142, 152, 171(b), 178, 186, 187, 189, 200(d), 200(e), 200(g)[q](ii), 223, 235, and 266. Mr. Jacoby continues to falsely swear at paragraph 17 "Thus, plaintiff and her counsel/employer have plainly used the privileged information acquired through their 'egregious' misconduct, in defiance of the State Court's Order, in fashioning their pleadings in the instant suit, and indeed, have used the privileged information to attempt to relitigate the claims against the defendants in the State Court Action that were dismissed and to undertake the malicious prosecution of new claims against your deponent [defendant Mark A. Jacoby] and Messrs. Baer and Wolff."

37. Contrary to Mr. Jacoby's false statements in paragraphs 15, 16 & 17:

(a) the Disputed Documents were not used in "fashioning" the pleadings in the Amended Verified Complaint; and

(b) the claims against the defendants in the State Court Action were not dismissed it was the complaint that was dismissed.

38. As Mr. Jacoby and defendants know, but have attempted to conceal from the Court, the information referred to in my Amended Verified Complaint is available from public sources, or duly authorized discovery, and does not "use" or "misuse" confidential information from the Disputed Documents.

39. Each of the paragraphs referred to in the Jacoby affidavit at paragraph 16 refers to information that is in the public record, and not confidential.

40. Paragraph 65 of the Verified Amended Complaint includes the following sources:

(a) Letter from Arthur M. Wisehart to Robert M. Bender, Jr., with cc: Mr. Richard F. Schubert, President, American National Red Cross, with enclosed Summons with Notice dated June 30, 1989;

(b) Verified complaint served on defendants Robert M. Bender, Jr., The American National Red Cross, and the American Red Cross in Greater New York on August 15, 1989;

(c) Correspondence sent to Dr. Lewellys Barker, Chief Medical Officer and Senior Vice President, American National Red Cross, that I was unable to secure new employment due to professional and personal defamation and retaliation by defendant Bender;

(d) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender to JoAnn Jamann, Chairman of the New York Red Cross Health Education Committee, with direct reporting ties to American National Red Cross Nursing Committee, and examination of Joan Carol Lipin taken before trial;

(e) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender to Carl Desch, Treasurer of the New York Red Cross, and member of the Executive Board [Board of Trustees] of the New York Red Cross, and Compensation Committee, and admissions of Carl Desch taken before trial on **June 17, 1991**, correspondence and notes of conversations produced in discovery, admission of Carl Desch that he "knew all about Bender/Fletcher at Sterling Forest,"

(f) Admissions of Delbert Staley taken before trial on **June 20, 1991**, Chairman of the New York Red Cross Executive Board [Board of Trustees], and member of the Board of Governors of The American National Red Cross;

(g) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation by defendant Bender to James T. Byrne, Jr., Assistant Treasurer, Chairman of the Budget Committee and member of the New York Red Cross Executive Board [Board of Trustees], and Senior Vice President of Bankers Trust, New York, New York, which is the Treasurer and Fiscal Agent of The Endowment Fund of the Board of Trustees of the American National Red Cross;

(h) Jesse D. Wolff, Of Counsel Weil, Gotshal & Manages, in-house counsel for the New York Red Cross, counsel for defendants Bender and the New York Red Cross, member of the Audit Committee and Executive Board [Board of Trustees] of the New York Red Cross;

(i) Sworn testimony and admissions of Barbara E. Fletcher at her examination before trial on April 15, 1991, at which counsel for all three Red Cross defendants were present;

(j) The Official Court Transcript of the hearing before Justice Haller on July 12, 1991, at which counsel for all three Red Cross defendants were present and heard Justice Haller state on the record:

> "The Court[Justice Haller]: It seems to me in reading portions of the deposition [Fletcher] that, from what I have read, the relevant portions, in fact, establish that there was an intimate relationship between these two people [Bender and Fletcher] .... We're all grown-ups and I think it's very clear here that everybody understands that these folks [Bender and Fletcher] were having an intimate relationship." (TR 7/12/91, p. 8; emphasis added.);

(k) Disclosure of defendant Bender's acts of sexual harassment inflicted upon me, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender to Mary Stanton, Director for Human Resources, and admissions of Mary Stanton at her examination before trial taken on June 6, 1990, at which counsel for all three Red Cross defendants were present;

(l) Disclosure to Angelo Cinti, peer and Senior Manager, of defendant Bender's acts of sexual harassment, sexual

misconduct, sex discrimination, retaliation and defamation by defendant Bender, and admissions of Angelo Cinti at his examinations before trial at which counsel for all three Red Cross defendants were present;

(m) Disclosure to Marion Foster, Director of Health Education and direct report, of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender, and admissions of Marion Foster at her examination before trial at which counsel for all three Red Cross defendants were present;

(n) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender to Barnet Deutch, Senior Volunteer Consultant with direct ties to American National Red Cross, and admissions of Barnet Deutch at examinations before trial at which counsel for all three Red Cross defendants were present;

(o) Admissions of Jill Birnbach, Director of Training, at her examination before trial on June 5, 1991 at which counsel for all three Red Cross defendants were present;

(p) My emphatic statement of "**No**" to defendant Robert M. Bender, Jr.'s question "It is so easy to have a discrete affair, think about it," my repeated **rejections** of his physical and sexual assaults of sexual harassment, and my repeated **objections** to defendant Bender's outrageous misconduct in suggesting while he stroked his penis, when I inquired about the raise to which I was entitled, and stating, as he did so, "You know what you have to do; think about it;" and admissions of Robert M. Bender, Jr., at his examination before trial taken on June 13 & 14, 1991;

(q) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender to Loring Wood, Executive Board Member reporting directly to Delbert Staley CEO and President of NYNEX and Chairman of the Executive Board [Board of Trustees] of the New York Red Cross;

(s) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender to Edmund O. Rothschild, Executive Board [Board of Trustees] Member-At-Large of the New York Red Cross;

(t) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender to William Dackis, Chairman of the Audit Committee and Executive Board [Board of Trustees] member of the New York Red Cross;

(u) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender to Christopher York, Member of the Budget Committee and Executive Board [Board of Trustees] member of the New York Red Cross, and Chairman of the New York Red Cross Chapter;

(v) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, and retaliation to Bill Weed, Member of the Executive Committee [Board of Trustees];

(w) Disclosure of defendant Bender's acts of sexual harassment, sexual misconduct, sex discrimination, retaliation and defamation by defendant Bender to John Goetz, Chief Executive Officer, New Jersey Red Cross, with direct ties to the American National Red Cross;

(x) Letter dated July 3, 1991 to Barbara M. Cummins, of Morgan, Lewis & Bockius, counsel for defendant American National Red Cross which states that "Plaintiff therefore demands that the President take immediate action pursuant to her powers in the Code of Procedure so that the pending litigation will be conducted in the true interest of the American Red Cross rather than an adjunct of a cover-up scheme orchestrated by a misbehaving Red Cross officer and his counsel." (Emphasis added.)

(y) Disclosure of the factual information contained in the Disputed Documents put into the public record on July 8, 1991 by defendant Mark A. Jacoby in his cross-examination of Joan Carol Lipin with respect to the contents of the Disputed Documents, (TR 7/8/91, pp. 68-70, 74-78, 83-87 & 93-94), disclosure of redacted Pages 1 & 7 of the Disputed Documents as enclosures with a letter to Justice Moskowitz and FAXED at the instruction or direction of Mark A. Jacoby to my attorney and to Barbara M. Cummins, of Morgan, Lewis & Bockius, counsel for defendant American National Red Cross, on July 15, 1991, false "personal knowledge affidavits of defendant Mark A. Jacoby that repeatedly refer to the Disputed Documents and contain malicious defamatory statements made with willful

intent to injure my professional and personal reputation dated July 3, 1991, October 29, 1991, February 3, 1992, July 7, 1992 and July 10, 1992; false "personal knowledge" affidavits of defendant Lawrence J. Baer that repeatedly refer to the Disputed Documents and contain malicious defamatory statements made with willful intent to injure my professional and personal reputation dated July 3, 1991 and October 23, 1992, the affidavit of Kevin P. Hughes that refers to the Disputed Documents and contains malicious defamatory statements made with willful intent to injure my professional and personal reputation, and false, and defamatory public statements made in the public record by defendants Jacoby and Baer, and Kevin P. Hughes made with willful intent to injure my professional and personal reputation;

(y) The Official Court Transcripts of the hearings before the Court on March 27 & 28, 1991, April 3 & 12, 1991, May 13, 21, 23 & 29, 1991, July 3, 8, 9, 11, 1991, July 12, 1991, July 23, 1992, August 6, 1992, July 7, 1992 and July 10, 1992, and October 29, 1992; and

(z) Objections of the open and notorious Bender/Fletcher relationship by Jane Gardner, Gary Bloom, Carol Cohen, Marion Foster, Mary Stanton, Dorothy

Britton, Robin Hecht, Bridget Acosta, Edward B. Talvy, Angelo Cinti, objections by Gloria Kerstein with respect to the fact that sexual harassment and sexual discrimination exists at the New York Red Cross, 7 days of testimony by Joan Carol Lipin at which counsel for all three Red Cross defendants were present, and discovery produced by all parties.

41. Paragraph 68 of the Verified Amended Complaint includes the following sources:

(a) Sources for paragraph 65.

42. Paragraph 80 of the Verified Amended Complaint includes the following sources:

(a) Sources for paragraphs 65 and 68; and

(b) The unsigned false negative statement "PREPARED AT THE REQUEST OF WEIL, GOTSHAL & MANGES," re Joan Lipin, given to Edward B. Talvy, Director of Personnel the New York Red Cross by Mary Stanton, Manager for Human Resources New York Red Cross, in an attempt to coerce Talvy's signature;

43. Paragraph 91 of the Verified Amended Complaint includes the following sources:

(a) Sources for paragraphs 65, 68 and 80;

(b) Defendants Bender and the New York Red Cross **admitted** that approximately **50%** of my work product and/or papers relating to Joan Carol Lipin were shredded, discarded and destroyed (Defendants' Verified Supplemental Responses signed by defendant Bender 3/7/91; and Barbara Fletcher's sworn testimony at her examination before trial taken on 4/15/91, pp. 121-123);

(c) Design and implementation of the first Executive Board [Board of Trustees] approved cost accounting system for the New York Red Cross, design and implementation of a Health Services Division, design and implementation of a Marketing Department, Health Education, and Safety Training and Injury Prevention, and Community Health Programs Departments, design and implementation of new AIDS education programs, preliminary design of an AIDS model education program for State Paroles, design and implementation of new public health education, safety training and injury prevention, and community health programs, in excess of $300,000 secured in grants and contracts; design and implementation of the first Strategic Planning goals and objectives for the New York Red Cross;

(d) The American Red Cross in Greater New York Minutes of the Executive Board Meeting dated January 27, 1988;

(e) Red Cross executives, Directors and support staff;

(f) Dr. Fred Katz, Vice President for Research at the American National Red Cross;

(g) James Krueger, Vice President for Financial Development at the American National Red Cross;

(h) Rick Bjurklund and John Hendrickson at the American National Red Cross;

(i) Dr. Lewellys Barker, Rochelle Zeidman AIDS Program Manager, American National Red Cross;

(j) Steve Bullock, General Manager of the Cleveland Ohio Chapter;

(k) Bridget Acosta; Joseph Costanzo, Ketty Garcia, Carol Cohen, Michael Reilly, Mary Stanton; Gary Bloom; Clem Titcomb; Marion Foster; Jane Gardner;

(l) The American Red Cross in Greater New York Chapter News;

(m) Personal excellence evaluations and written comments submitted to American National Red Cross;

(n) The American Red Cross in Greater New York Management Committee Minutes produced in discovery;

(o) Direct personal knowledge of the subject matter and content discussed at The American Red Cross in Greater New York Management Committee Minutes that defendants have refused to produce in discovery and/or destroyed;

(p) Alan Rhodda, Vice President Personnel Department, American National Red Cross; and

(q) All relevant affidavits and moving papers filed all parties including defendants' Affirmation Defenses.

44. Paragraph 127 of the Verified Amended Complaint includes the following sources:

(a) Sources for paragraph 91;

(b) **Admissions** of Barbara E. Fletcher, at her examination before trial that **she shredded**, as the assistant to and agent of defendant Bender, **the papers relating to Joan Carol Lipin**; and

(c) Jill Birnbach, and Marion Foster.

45. Paragraph 142 of the Verified Amended Complaint includes the following sources:

(a) Sources for paragraph 127.

46. Paragraph 152 of the Verified Amended Complaint includes the following sources:

(a) Sources for paragraph 142.

47. Paragraph 171(b) of the Verified Amended Complaint includes sources:

(a) Sources for paragraphs 152.

48. Paragraph 178 of the Verified Amended Complaint includes sources:

(a) Sources for paragraph 171(b);

49. Paragraph 186 of the Verified Amended Complaint includes sources:

(a) Sources for paragraphs 178;

(b) Joan Lipin twice appointed Acting [General] Manager by defendant Bender;

(c) Letter of Recommendation of Joan Carol Lipin from Dr. Lewellys Barker;

(d) Letter of Recommendation of Joan Carol Lipin from Robert M. Bender, Jr.;

(e) Robert M. Bender's memoranda with respect to Joan Carol Lipin's "resignation;" and

(e) Recognition letter and plaque from the American National Red Cross in appreciation for Joan Lipin's leadership and guidance.

50. Paragraph 187 of the Verified Amended Complaint includes sources:

(a) Sources for paragraphs 186.

51. Paragraph 189 of the Verified Amended Complaint includes sources:

(a) Sources for paragraph 187.

52. Paragraph 200(d) of the Verified Amended Complaint includes sources:

(a) Sources for paragraph 189.

53. Paragraph 200(e) of the Verified Amended Complaint includes sources:

(a) Sources for paragraph 200(d).

54. Paragraph 200(g)[q](ii) of the Verified Amended Complaint includes sources:

(a) Sources for paragraph 200(e);

(b) Participation of Mark A. Jacoby of Weil, Gotshal & Manges, in the conspiracy with defendant Bender to unlawfully terminate William Lattimore;

(c) Edward B. Talvy affidavit sworn to October 30, 1991, annexed hereto as Exhibit C;

(d) Edward B. Talvy's Reply Affidavit sworn to December 11, 1991, annexed hereto as Exhibit D, to deprive other Red Cross employees of their civil rights;

(e) False, defamatory and slanderous public statements made to the press by Mark A. Jacoby, a named defendant in my Federal Complaint to New York Newsday on June 19, 1992, p. 45. The Newsday item stated that both my attorney and I declined to comment. (New York Newsday, June 19, 1992, P. 45.)

The Newsday item states:

Mark A. Jacoby, a lawyer for the Red Cross who has also been named in the lawsuit, said he planned to seek an immediate dismissal of the case ...

While Jacoby would not respond to the specific charges, he did say Lipin failed to follow the agency's regulations for handling complaints, including allegations of sexual harassment.

> Mark A. Jacoby said: "There's a grievance procedure available under the American Red Cross procedures which she [plaintiff] did not invoke," Jacoby said.
>
> Mr. Jacoby is further quoted as saying
>
> "Indeed, if she [plaintiff] had been harassed she could have pursued with the agency a grievance procedure."
>
> Attempts to reach Lipin failed. Lipin's lawyer, Arthur M. Wisehart, refused to comment.

55. Mr. Jacoby's statements to the press were known to be false and prejudicial at the time he made his statements.

56. As defendant Jacoby well knew, as the attorney of record in the State Action, I had repeatedly sought to obtain an investigation of my claims of sexual harassment and retaliation by the Chief Executive Officer of the New York Red Cross, and had raised that issue with every one in the power structure of that organization available to me, but without effect.

57. The false statements to the press by Mr. Jacoby are an important part of the new allegations in my Amended Verified Complaint.

58. Paragraph 223 of the Verified Amended Complaint includes sources:

(a) Sources for paragraph 200(g)[q](ii).

59. Paragraph 235 of the Verified Amended Complaint includes sources:

(a) Sources for paragraph 223.

60. Paragraph 266 of the Verified Amended Complaint includes sources:

(a) Sources for paragraph 235.

61. If Justice Moskowitz had in fact read the documents, she would certainly have known that they are directly relevant to and probative of the allegations of unlawful and tortious conduct by defendants in paragraph 17 of the State Action, which alleges:

> "17. Defendants engaged in sexual discrimination against women executives throughout the organization, and permitted the male employees, including defendant Bender and his predecessor as Manager, Robert Shea, to treat female employees, including plaintiff, as playthings who were fair objects of sexual harassment, favors, and sexual stereotyping. Further, throughout plaintiff's period of employment, defendant Bender repeatedly sought to coerce her into taking improper discriminatory action against other female employees despite the fact that the actions requested were not within plaintiff's job responsibilities, in addition to being unlawful."

62. The Disputed Documents are also relevant to and probative of the allegations of tortious conduct by defendants alleged in paragraphs 63, 64, 65, 66, 67 & 68 of the

complaint in the State Action, which state:

> "63. On information and belief, defendant Bender made the same defamatory statements and has engaged in a conspiracy to abuse plaintiff and wreck her career by interference with her prospective employers by publishing and repeating to others the defamatory statements alleged above.
>
> "64. Said slanderous statements were false and were known by defendant Bender to be false and were made with actual malice to plaintiff with willful intent to injure plaintiff and with the knowledge that they would be spread through the grapevine in the health care industry and repeated to others from whom plaintiff sought employment, causing irreparable injury to the reputation of plaintiff that can never be redressed. Defendant Bender conspired with Rothschild, Wood and other co-conspirators to publish and repeat said statements to others with the deliberate intent of ruining plaintiff's reputation and destroying her career.
>
> "65. But for the dissemination and publication of said statements, plaintiff would have obtained satisfactory employment and at a higher rate of compensation than she had at Red Cross based on her qualifications and experience.
>
> "66. Said activities of defendants have made it impossible for plaintiff to resume her career and profession.

"67. Said defamatory statements and acts of defendants (a) were vindictive, wanton and malicious, and made with express malice or in reckless or grossly negligent disregard of the rights of plaintiff, (b) were for the unlawful purpose of deterring others from seeking redress for such violations of their rights and (c) were in furtherance of the conspiracy to conceal and suppress disclosure of the pattern or practice of sexual discrimination and abuse within the Red Cross. Shortly after plaintiff's termination, in fact, defendant Bender caused a personnel "workshop" to be held in the Red Cross for the specific purpose of intimidating and coercing employees not to file complaints or sue because of such discriminatory and abusive employment practices.

"68. By reason of the foregoing, plaintiff has been damaged and injured in her reputation and standing in her profession, and has been subjected to great shame, humiliation, and indignity. Plaintiff has been prevented from securing employment from the time of termination to date, resulting in special damages of $142,855 in lost compensation to the date hereof. Further, plaintiff's profession and career in health services has been demolished, and plaintiff's resulting damages from lost compensation in said profession and career for her work life expectancy is $2,900,000.

63. A review of the Disputed Documents would demonstrate to this Court once and for all the existence of a clear cut conflict of interest of Weil, Gotshal & Manges and their attorneys which should result in their immediate

disqualification from these proceedings in their dual status as attorneys for the Red Cross and for defendants Bender, Stanton and the New York Red Cross.

64. Defendants mislead the Court in their memorandum when they state "... the Court has been careful to note that it has not formed any view or opinion regarding the merits of plaintiff's substantive claims." (Mem. fn, p. 8.)

65. However, defendants now contradict what they stated in their reply memorandum of law in the State Action dated November 17, 1992.

66. In that memorandum defendants clearly were relying on this Court's "view or opinion" or interpretation of the Order of Justice Moskowitz and they stated this in no uncertain terms to Justice Ciparick when they said "However, the latest decision of the Federal Court, dated October 29, 1992, denying plaintiff's application to vacate the stay is instructive and is attached hereto as Appendix A." (Mem. p. 7., TR pp. 23-26.)

67. The "views or opinions" of this Court used by defendants to influence the State Court are reflected in the transcripts of July 7, 1992, and October 29, 1992, and are incorporated by reference herein.

68. Instances of this Court's bias and prejudice exhibited at the impromptu Order to Show Cause application on July 7, 1992, at a time when my attorney of record was out of town and at a time that this Court stated that it had not read my verified complaint or amended verified complaint, (or my testimony of July 8, 1991), include (TR pp. 18 & 19)

(a) "The Court: Why should I now, ... undertake a hearing to determine the extent to which any allegations in the complaint are derived a fruit of the poison tree, to use a criminal law analogy?" and

(b) "The Court: It may not be visible, but I am showing great restraint at conduct which Justice Moskowitz categorized as egregious." (Emphasis added.)

69. Further bias and prejudice by this Court is exhibited at the hearing on October 29, 1992

"THE COURT: Well, sir you know, the fact that an associate appeared from your office who disclaimed familiarity with respect to some of the matters which are the subject of the Court's questioning and stated that You were on vacation, that's a circumstance which is not the responsibility of the Court."

70. The fact of the matter is that the associate who did appear in Court on July 7, 1992 because my attorney of record was away on vacation and was unreachable by telephone until only a short time before the impromptu Order to Show Cause was railroaded through by defendants, stated that he did not have sufficient knowledge of "some of the matters which are the subject of the Court's questioning" and yet, even though he repeatedly said this to Your Honor in addition to stating that my attorney of record was away on vacation, Your Honor incorrectly stated to my attorney on October 29, 1992 that "that's a circumstance which is not the responsibility of the Court," thereby denying me equal protection of the law.

71. The Court also stated at that hearing "Justice Moskowitz has recused herself -- for the reasons which she stated after the hearing, a transcript of which the Court has read --" (TR p. 4.)

72. However, if one were to compare the transcript of the hearing before Justice Moskowitz on July 23, 1992, and her stated reason on the record for her refusal on August 6, 1992 that "Because for an attorney to stand up in court and address the Court the way Mr. Wisehart did last time ..." one would quickly determine that there was no basis of fact for Justice Moskowitz's prejudicial records and one can only question why a "sitting judge" would demonstrate such animus towards me.

73. Justice Moskowitz, rather than hear oral argument and rule on defendants' Order to Show Cause dated July 10, 1992, after she learned that defendants did not submit opposition papers in response to my renewed motion to disqualify the Judge and defendants' counsel dated July 29, 1992, recused herself on August 6, 1992 and sent the State Action "back to the wheel."

74. Judge Sand exhibited further bias and prejudice when he stated "... or she will refer again to Justice Moskowitz, who will then have occasion to revisit her recusal, which is a very unusual recusal for very unusual reasons. Or there will be a complete vacuum and the consequences of that, as a matter or state law, I surely don't know." (TR 6)

75. Judge's Sand's true motives for granting defendants' impromptu Order to Show Cause which stayed my lawsuit, as reflected in this statement by him on October 29, 1992, is foreshadowed on July 7, 1992 when he states (TR pp. 33-34)

"The Court: Although the motion is termed an order to show cause with a request for temporary relief, unless parties advise me otherwise, I see no need for further proceedings before the District Court." (Emphasis added.)

76. Based both upon what Judge Sand has permitted to occur, and upon what Judge Sand has said, I am forced to conclude that Judge Sand has not been and cannot be impartial in this proceeding, and the his disqualification is mandatory under 28 U.S.C. § 455(a).

77. The reasons for the lack of impartiality of Judge Sand are unclear, but the results are clearly apparent.

78. Perhaps Judge Sand is sympathetic to the Red Cross in addressing the homeless and housing issues that are matters of public concern, or perhaps he does not feel comfortable with sexual harassment cases in view of the great amount of publicity that charges of sexual harassment against public figures have recently received in the press; perhaps he does not like the behavior of Marc Rich, my second counsel, over whose case he has presided.

79. Further, it is statistically probable that, as a prominent Judge sitting in New York City, Jude Sand is friendly with and has confidence in at least some of the 400 - plus lawyers in the law firm representing defendants in this litigation in which high-level attorneys who are members of that law firm are named defendants herein, a situation also requiring disqualification under 28 U.S.C. § 455 (b)(1) (where the Judge has personal bias or prejudice concerning a party ....).

80. Disclosure by Judge Sand concerning his knowledge of and relationships with attorneys with the law firm of Weil, Gotshal & Manges is respectfully requested.

81. Judge Sand as well as Justice Moskowitz have both avoided addressing my motions to disqualify defendants' counsel, a large, high-prestige and politically potent law firm, for violation of Disciplinary Rules found in the Code of Professional Responsibility that explicitly prohibit conduct of the kind in which defendants' counsel have repeatedly engaged without rebuke.

82. So long as the judicial system is unable to bring itself to confront and decide such issues that have been squarely presented to it, I will continue to believe that there has been an infringement of my Fourteenth Amendment Constitutional right to "equal protection of the laws."

WHEREFORE, recusal should be granted, and the matter re-assigned to another judge for further proceedings.

Respectfully submitted,

/s/

Joan Carol Lipin

Sworn to before me this

2nd day of December, 1992:

/s/

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

- against -

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF,

Defendants.

92 Civ. 4455 (LBS)

AFFIDAVIT OF JOAN CAROL LIPIN IN SUPPORT OF PLAINTIFF'S MOTION TO VACATE STAY AND OTHER RELIEF

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action and have personal knowledge of the facts and circumstances stated herein.

2. This affidavit is respectfully submitted in support of a motion for an order vacating the Order of this Court dated July 7, 1992, which stayed this litigation and sealed the complaint herein, pending the completion of certain proceedings to be commenced by defendants in the New York

Supreme Court, New York County.

3. Such a motion is now appropriate in view of the circumstances presented herein.

4. On July 21, 1992, a Motion for Reargument was served in order to bring to this Court's attention the case of Donovan v. City of Dallas, 377 U.S. 408 (1964), a highly relevant authority not cited by defendants' counsel in their application to this Court for the stay granted on July 7, 1992.

5. The decision in Donovan indicates that the New York Court has no jurisdiction for the draconian action which defendants used as the fulcrum to obtain the stay from this Court, namely, a contempt proceeding against me and my counsel for filing this action.

6. On August 5, 1992, to protect my rights, a Notice of Appeal was filed with respect to this Court's Order of July 7, 1992.

7. On August 26, 1992, this Court declined to rule on my Motion for Reargument on the ground that it lacked jurisdiction to do so in view of the pending appeal (Exh. A annexed hereto).

8. However, on September 22, 1992, the Court of Appeals for the Second Circuit dismissed the appeal for lack of jurisdiction under the "final order" doctrine (Exh. B annexed hereto).

9. Now that this Court's jurisdiction is clear, this motion is being made promptly to bring to its attention the changing circumstances that make the vacation of the stay previously ordered appropriate at this time, and also to show that it was obtained by fraud perpetrated by defendants.

10. The Order of July 7, 1992, states that is was issued (TR 7/7/92, p. 33, annexed as Exh. C) --

> "... without prejudice to the right of either party to seek a lifting or modification of the stay should circumstances make such an application appropriate."

11. Vacation of the stay is appropriate in view of the following circumstances:

> (a) the recusal of Justice Karla Moskowitz on August 6, 1992, from the New York Court action when she determined that she could not be impartial. Justice Moskowitz was the judge who had been assigned to the action in the New York County Supreme Court, whose Order dismissing the complaint in that action on January 9, 1992, was the basis on which defendants sought to return before her to initiate contempt proceedings in connection with the filing of the instant action (TR 8/6/92, annexed hereto as Exh. D.);
>
> (b) my constitutional right to proceed in this Court as shown by the controlling decision of Donovan v. City of Dallas, supra;
>
> (c) the circumstances of crucial importance involving irreparable injury to me that could not be brought to the attention of this Court in issuing its stay order of July 7, 1992, at a time when (a) the attorney in charge of my case was unavailable, (b) a young attorney lacking the necessary familiarity with the case had to step in with virtually no notice or time for

preparation, and (c) I was not given an opportunity to submit opposition papers; and

(d) Red Cross defendants' perpetration of fraud on this Court in fraudulently obtaining its Order of July 7, 1992, through the use of false and perjured affidavits of attorneys subject to mandatory disqualification from acting as their counsel.

A. THE RECUSAL OF JUSTICE MOSKOWITZ

12. The premise of this Court's stay of July 7 was that, although the complaint in the New York Action had been dismissed six months before, a determination could be secured from Justice Moskowitz concerning the effect, if any, of her Orders of January 9, 1992, on my right to prosecute this litigation.

13. My request for the recusal of Justice Moskowitz raised the question of whether the crippled New York Court system could be expected to produce "justice" for me as against unscrupulous and politically potent adversaries whose filing of false affidavits by disqualified attorneys, shredding and destruction of evidence favorable to me, tampering with witnesses, fabrication of false evidence and conducting a hate vendetta against me, in retaliation for my having made sexual harassment charges calling for an investigation involving the Chief Executive Officer of the New York Red Cross, the New York Court was willing to tolerate without rebuke or censure at the same time it sought to bury the merits of my case by dismissing it on entirely unrelated procedural grounds that stemmed from the gross carelessness or worse by defendants' counsel in their mishandling of documents that exposed the unlawful conduct of their clients.

14. In the proceedings before Justice Moskowitz, defendants' counsel disregarded what I am informed is the very obvious fact that they ethically are subject to mandatory disqualification from acting as counsel for the Red Cross defendants, and have been so for a considerable period of time, an issue that had been raised (but never decided) in the New York action well before entry of that Court's Order of January 9, 1992. For obvious reasons, the decision of such an issue should have been given priority over all other proceedings.

15. Messrs. Jacoby and Baer of Weil, Gotshal & Manges who themselves are named defendants in this action, are both disqualified as necessary witnesses and have a conflict of interest in representing the Red Cross and the individuals named as defendants, as shown by the verified allegations in the complaints filed in this case and affidavits filed in the New York action.

16. When Mr. Jacoby induced Justice Moskowitz to sign an ex parte Order to Show Cause on July 10, 1992, I promptly raised the disqualification issues as they pertained to both the judge and to Weil, Gotshal & Manges by a Cross-Motion dated July 21, 1992. (Lipin Aff. 7/21/92, Exh. E annexed hereto.)

17. At the hearing of July 23, 1992, Justice Moskowitz (who admitted that she had not previously read my Cross-Motion papers) peremptorily denied the recusal application. (TR 7/23/92, pp. 5-6, & 8, Exh. F annexed hereto.)

18. However, Justice Moskowitz did not rule on the request in the Cross-Motion to disqualify Weil, Gotshal & Manges, which remains pending.

19. Moreover, Justice Moskowitz acknowledged that a jurisdictional issue had been raised by me that would have to be considered, and adjourned further proceedings to August 6, 1992. (id. at p. 14.)

20. Because of the inadequacy of the attention to recusal issues received from Justice Moskowitz, coupled with further evidence of bias and prejudice displayed by her at the hearing of July 23, 1992, I was forced to renew my request for her recusal. (id.)

21. Defendants' counsel did not file opposition papers either to my initial or renewed application for the recusal of Justice Moskowitz, to the surprise (and chagrin) of Justice Moskowitz. (Nor did they file any papers in opposition to my request for their own disqualification.)

22. Accordingly, at the hearing on my renewed Cross-Motion on August 6, 1992, Justice Moskowitz inquired of counsel for defendants as follows (Tr. 8/6/92, p. 4, Exh. D):

> "The Court[Justice Moskowitz]: Now, I have this motion for renewal. I don't have any opposition papers to that, to the renewal."
>
> "Mr. Jacoby: None are offered, Your Honor, [with regard to the] motions to renew. There is no additional basis for recusal offered in these papers. It is perfectly, absolutely frivolous, apart from being scurrilous in the allegations against the Court."

23. The statements of Mr. Jacoby were incorrect, as additional bases for recusal were in fact shown in the papers renewing the Cross Motion. (Lipin Aff. 7/29/92, Exh. G, annexed hereto.)

24. Accordingly, on the record as thus made, Justice Moskowitz had no alternative but to recuse herself, and did so, stating in the process that (TR 8/6/92, pp. 6-7, Exh. D)

> "I cannot be fair to either side in this case anymore and I am recusing myself."

25. Justice Moskowitz regrettably lost control of herself in the process, making further statements sadly lacking judicial self-restraint. The injection of personal animus into the record by a judge who had admitted that she was unable to be fair in the case, deliberately intended to cause injury and prejudice to me in further judicial proceedings, is an unfortunate perversion of the judicial process.

26. The "fruit of the poison tree" of judicial bias will cause continuing injury to me unless the circumstances concerning Justice Moskowitz described in my affidavit sworn to on July 29, 1992, in support of the renewal of my Cross-Motion for her recusal are considered. (Lipin Aff. 7/29/92, Exh. G.)

27. Since she herself made that finding, defendants cannot deny the existence of bias and prejudice on the part of Justice Moskowitz but may argue that such condition did not exist at the time of her Orders of January 9, 1992.

28. However, a very simple test demonstrates that Justice Moskowitz was similarly afflicted by bias and prejudice against me on Janaury 9, 1992. When she ruled, Justice Moskowitz, who had copies of the Disputed Documents which I had discovered in front of me on June 28, 1991, in her possession for a period of approximately six months, stated (Tr. 1/9/92, p. 8, annexed hereto as Exh. H):

"The Court[Justice Moskowitz]: I don't even see anything in these papers in relation to this lawsuit."

29. However, a rapid review of the papers will reveal the preposterous falsity of that statement by Justice Moskowitz.

30. Evidence of a deep-seated bias reaching back well before the hearing of August 6, 1992, and including her Orders of January 9, 1992, and before then, is found in the personal animus in the judge's statements, and in her failure to act upon the pervasive and heinous discovery abuse shown by my motions to strike defendants' answers and disqualify their counsel. If, in hindsight, the judicial system tells me that I may have made a mistake in the way I handled the Disputed Documents, in the novel circumstances presented, such an error would not rise to the level of the deliberate shredding of large quantities of documents favorable to me, or the deliberate tampering with a key witness, the person who shredded them, defendant Bender's female assistant and playmate at the Red Cross.

31. Further evidence of the bias and prejudice of Justice Moskowitz is the expectation of defendants' counsel that through contempt proceedings, initiated by an ex parte Order to Show Cause obtained from her, they would be able to influence her to incarcerate me and my counsel, or to make it impossible for me to ever prosecute my civil rights claims involving sexual harassment and conspiratorial retaliation, or to exercise my First Amendment Rights of Free Speech and to Petition for a Redress of Grievances in connection with the injuries that have been inflicted upon me by defendants.

32. Defendants' counsel obviously expected to be able to influence a biased judge at a minimum to rewrite the

Orders of January 9, 1992, either overtly by modifying the language of the orders, or more subtly by their retroactive "interpretation."

33. Defendants' counsel, who were present at the time such orders were written by Justice Moskowitz, are estopped from arguing in hindsight for changes they had ample opportunity to previously suggest. (Wisehart Aff. 8/4/92, ¶¶ 13-16, annexed hereto as Exh. I.)

34. The premise of this Court's Order of July 7, 1992, no longer exists, with the recusal of Justice Moskowitz, and it accordingly should be vacated.

B. INORDINATE DELAY AND EXPENSE CAUSE IRREPARABLE INJURY

35. Inordinate delay and expense in the prosecution of this litigation will be caused by the additional New York Court proceedings that defendants have sought to initiate through the use of false affidavits from attorneys subject to mandatory disqualification.

36. Such circumstances cause irreparable injury to me.

37. I am heavily in debt. My chosen career as a health professional is in ruins.

38. I have been utterly unable to re-establish myself professionally because of the conspiratorial activities surreptitiously conducted against me by defendants.

39. For more than four years I have attempted to obtain an investigation and determination by the Red Cross of

my charges of sexual harassment by the Chief Executive Officer of the New York Red Cross, but without success due to abusive litigation strategies and tactics intended to conceal rather than expose and rectify the misconduct of its Chief Executive Officer, defendant Bender.

40. In retaliation, the Red Cross defendants, under the domination of the Chief Executive Officer and conflicted counsel representing him individually as well as the Red Cross have maliciously defamed me in statements and false affidavits.

41. The longer this Court's stay permits the proceedings to go on endlessly in the morass of the New York Court System, the longer it will take to rebuild from the wreckage of my career, which continues in limbo, and to recover from the intense mental anguish and emotional distress that continue to afflict me.

42. Defendants misused this Court's Order of July 7, 1992, as a basis for seeking action from the New York Court that is profoundly different from their representations to this Court (Jacoby Aff. 7/10/92, ¶¶ 21, 23, & 24, Exh. J).

43. Defendants represented to Your Honor that they would seek from Justice Moskowitz in the New York Action an interpretation of whether the filing of this action was permissible under her Order of January 9, 1992.

44. However, in addition to what the Order of Justice Moskowitz now provides, defendants seek its amendment so that it specifies that the dismissal of the State Action by Justice Moskowitz was "with prejudice" or "on the merits," words that Justice Moskowitz, with full knowledge of the law, failed to include at the time she prepared her Orders of January 9, 1992 (in the presence of counsel for defendants. (Wisehart Aff. 8/4/92, Exh. I.)

45. Defendants also requested provisions that would destroy my right to be effectively represented by any counsel. (Jacoby Aff. 7/10/92, ¶ 23, Exh. J.)

46. Unless this Court's stay is vacated irreparable injury will result in the form of plunging me into endless and expensive New York Court proceedings that I can not afford and that will do nothing to remedy defendants' acts of sexual harassment and retaliation.

47. Extended delays are the normal course of business in New York County Court. That Court is afflicted by chronic understaffing, and deplorably inadequate facilities and archaic rules permitting virtually limitless interlocutory appeals made to order for the litigation by attrition employed by defendants in this litigation.

48. I have neither the finances, nor the strength, nor do I have the time remaining in my career life expectancy to be able to devote to extended proceedings, in such a court, nor will I ever be in a position to counteract the substantial political influence that the Red Cross defendants with their extensive political network can and do exert upon New York elective trial court judges.

49. Moreover, the chaotic conditions that exist in the New York Court, based upon my own observation, make the possibility of a rational and just decision a forlorn hope indeed, as corroborated by informed observers from within the New York judicial system.

50. In "Why I Quit the New York Bench," appearing in the New York Times of October 1, 1992, after describing the unbelievably bad conditions that exist, Justice Harold Baer, Jr. makes statements that are of direct relevance to my own experience in the New York Court (p. 25):

> "Even a moment for contemplation and thoughtful decision-making is sheer fantasy .... It is impossible with these conditions for a judge who strives to be conscientious to provide the public with the quality of justice that is their right."

51. As a consequence, my constitutional right to jurisdiction in the Federal Court is a very precious right to me. The Red Cross defendants' actions intended to negate that right through exposing me to further extended proceedings in the New York County judicial system, as facilitated by this Court's stay, constitutes a severe impairment of my constitutional rights.

C. NO JURISDICTIONAL BASIS EXISTS FOR FURTHER ACTION BY THE NEW YORK COURT

52. Donovan v. City of Dallas, 377 U.S. 408 (1964), indicates that defendants' plan to use extended New York Court contempt proceedings to block or delay meaningful access to this Court was contrary to established jurisdictional principles that defendants' counsel failed to bring to this Court's attention.

53. While I do not expect to be held in contempt, my banishment from this Court while I am ruined as a result of being chewed up by extended proceedings in the New York Court on matters having nothing to do with the merits of my claim is an even more drastic penalty, as a practical matter.

54. As admitted by defendants' counsel, in the papers filed in the State Action dated July 30, 1992 (Defendants' Supplemental Memorandum of Law 7/30/92, p. 15):

"... defendants have not sought an injunction from the State Court against the prosecution of the Federal Action." (Emphasis added.)

55. Thus it has been conceded by defendants there is and never was any bar or obstacle to my proceeding with this action at any time as a result of the dismissed State Action.

56. Moreover, as shown in the accompanying Memorandum of Law, jurisdiction does not exist in the New York Court now to add injunctive language, or to punish for contempt, or to convert a without prejudice dismissal of that case nine months ago to a dismissal with prejudice.

D. THE DISQUALIFICATION OF COUNSEL FOR THE RED CROSS DEFENDANTS

57. Moreover, the attorneys who obtained the stay from this Court as a springboard to launch extended state court proceedings were subject to mandatory disqualification.

58. Three lawyers from the law firm of Weil, Gotshal & Manges, are individual defendants in this litigation and, in addition, represent the Red Cross defendants as well as defendant Bender, the perpetrator of the acts of sexual harassment alleged in the complaint.

59. They are Mark A. Jacoby, his associate Lawrence J. Baer, and Jesse D. Wolff, a senior lawyer with Weil, Gotshal & Manges who also has fiduciary duties as a Trustee of the New York Red Cross.

60. The disqualification issue was not and could not be addressed on July 7, 1992, when the stay was granted by this Court without affording any opportunity to submit opposing

papers.

61. Such attorneys' disqualification also applies to the New York proceeding, an issue that, as stated above, has been left undecided by the New York Court.

62. I am informed that Disciplinary Rule 5-102(A) of the Code of Professional Responsibility (McKinney's N.Y. Jud. Law Appendix) states:

> "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness in behalf of his client, he shall withdraw from the conduct of the trial...."

63. The "personal knowledge" affidavits used by the lawyers in Weil, Gotshal & Manges in obtaining the stay granted by this Court mandates that firm's disqualification from continuing to represent the Red Cross defendants, and the vacation of the stay improperly obtained from this Court.

E. THE FALSITY OF THE ATTORNEYS' AFFIDAVITS USED BY DEFENDANTS TO INDUCE THIS COURT TO ISSUE A STAY

64. The affidavit of Lawrence J. Baer dated July 3, 1991, relied upon by defendants in obtaining the stay and Order to Show Cause dated July 7, 1992, from Your Honor, is false, and was known by the attorneys from Weil Gotshal & Manges to be false when they submitted it. (Exhibit K for convenient reference is a copy of Exhibit C annexed to defendants' papers used in obtaining the stay from this Court.)

65. The Baer affidavit makes the following statements purportedly on the basis of personal knowledge concerning the "Disputed Documents" it contends that I wrongfully obtained:

> "5. When I[Baer] entered the examination room prior to the start of the deposition, I unpacked the contents of my briefcase, which included, among other things, typewritten Weil, Gotshal & Manges memoranda prepared by me ...."
>
> "6. I[Baer] placed the contents of my briefcase on the bench that was positioned along the wall behind me, except for a legal pad which I placed on the table in front of me in order to take notes;" and
>
> "10. ... I[Baer] left my papers unguarded, in the EBT room on the bench behind my chair, on the opposite side of the room from where plaintiff and her attorney were seated." (Emphasis added.)

66. Thus the Baer affidavit falsely claims that the copies of the Disputed Documents were found by me in the "EBT room" on a bench along the wall behind Mr. Baer, not on the conference table in front of him (and two other representatives of opposing counsel) in Special Referee Birnbaum's conference room.

67. The reference to the "bench" in the "EBT room" is crucial because it is not the same room in space or time as Mr. Birnbaum's conference room, where I stated in my sworn testimony before Justice Moskowitz on July 8, 1991, that I found the documents.

68. The parties present did not go to the fifth floor "EBT room" for the deposition referred to in the Baer affidavit until approximately 11:00 a.m., after an argument that began at approximately 9:30 a.m. before Special Referee Birnbaum on directions not to answer given by defendants' counsel.

69. The "EBT room" is a separate room from the Birnbaum conference room on an entirely different floor of the New York County Courthouse.

70. The falsity of the Baer affidavit is also shown by the fact that there was no "bench" positioned along the wall behind him in the Birnbaum room, which is where I found the papers.

71. Prior to my arrival at Mr. Birnbaum's room at approximately 9:30 a.m. on the morning of June 28, 1991, the Disputed Documents had been placed squarely and neatly stacked, in a condition that was open and unsealed, and without any markings of confidentiality or privilege, in front of the place where I customarily sat at the 12x6 foot conference table. (Lipin Testimony 7/8/91, p. 30-31, 43-44, annexed as Exh. L.)

72. As quoted above, paragraphs 5 and 6 of the Baer affidavit affirmatively state that after he [Baer] entered the "EBT room," Mr. Baer unpacked the Disputed Documents from his briefcase and <u>put them on the bench</u> behind him.

73. In other words, Mr. Baer states under oath that <u>he actually saw</u> and physically handled the Disputed Documents shortly after entering the "EBT room."

74. In actual fact the Disputed Documents were at that time in my own possession, and had been for over an hour.

75. Mr. Baer therefore could not have possibly seen the documents at the time Mr. Baer swears that he put them on the bench behind him in the "EBT room," or have placed them where he said he did, because I had them at the time.

76. Mr. Baer, a skilled attorney, undoubtedly knew that such sworn statements involving the physical impossibility of placing documents he no longer had on a bench behind him in the EBT room were absolutely false when he made them.

77. The falsity of the sworn statements in Baer's affidavit subsequently were in effect conceded in a letter from him to my attorney dated January 24, 1992. (Exh. M annexed hereto.)

78. Unfortunately, however, this was a letter written by Baer shortly after Justice Moskowitz rendered her decision of January 9, 1992.

79. In his letter of January 24, 1992, written shortly after the decision of Justice Moskowitz, Mr. Baer stated that, contrary to his affidavit of July 3, 1991, the copies of the Disputed Documents, instead of being placed by him on the "bench" behind him in the "EBT room" were found by me on the conference table in a different room on a different floor at an earlier hour when we were there for a conference with Special Referee Birnbaum. (id. at p. 2, ¶ 1.)

80. Defendants' reliance upon a perjured affidavit is not limited to the Baer affidavit.

81. Mr. Jacoby's "personal knowledge" affidavit of July 3, 1991, Exhibit B attached to defendants' application for a stay with their Show Cause papers of July 7, 1992, also embraces the fictitious account contained in the Baer affidavit, attached as Exhibit C to Mr. Jacoby's affidavit, that I obtained

the documents in the EBT room from the bench behind Mr. Baer. (For convenient reference, the Jacoby affidavit is annexed hereto as Exh. N.)

82. Such statements by Mr. Jacoby are false to my direct knowledge. I did not sneak around and "surreptitiously" obtain the Disputed Documents from a bench behind Mr. Baer in connection with a deposition in the "EBT room."

83. Instead the documents were plainly visible on a table at a location where I usually sat at a conference table in Special Referee Birnbaum's room in front of and plainly visible to Mr. Baer, who was sitting where he regularly sits at the conference table, Mr. Parlow, of Morgan, Lewis & Bockius, co-counsel for defendant American National Red Cross, and an assistant from Mr. Baer's office, Ms. Hope Kerstman, where they had been placed over an hour and a half before we went from the Birnbaum room to the EBT room. (Lipin Testimony, 7/8/91, pp. 25, 42 & 66-67, Exh. L.)

84. Mr. Jacoby's cross-examination of me elicited a significant finding from Justice Moskowitz on this point at the hearing before her on July 8, 1991(id. at pp. 66 & 91):

> "Q. [by Mr. Jacoby]: How soon after the Referee began speaking with counsel did you notice those papers, those documents that you say were squarely in front of You?
>
> "A. Within moments of us having gone on the record."

Mr. Jacoby's cross-examination of me continues:

> "Q. Do you know where Mr. Baer's briefcase was?"

"A. No, I don't, Mr. Jacoby."

"Q. Do you know where Mr. Baer's papers were?"

"A. No, I don't Mr. Jacoby."

"The Court[Justice Moskowitz]: That is the answer." (Emphasis added.)

85. Like Mr. Baer, Mr. Jacoby implicitly admitted the falsity of his earlier affidavit by stating in his affidavit sworn to July 7, 1992, supplied to this Court, that the Disputed Documents were not taken by me in stealth from a bench behind Mr. Baer in the "EBT room." (Jacoby Aff. 7/7/92, ¶ 7, annexed hereto as Exh. O for convenient reference.)

86. However, the contagion of prejudice caused by the perjured Baer affidavit was spread further by Mr. Jacoby's submission of it to this Court to be relied upon as part of his application for a stay. Although Jacoby knew the Baer affidavit to be false, as well as his own earlier affidavit also dated July 3, 1991, both nevertheless were annexed with approval of his affidavit of July 7, 1992, in support of the application for the stay that this Court granted.

87. The Jacoby affidavit of July 7, 1992, and his earlier affidavit of July 3, 1991, are false for the additional reason that they claim "personal knowledge" of the facts (¶ 1; ¶ 2), whereas Mr. Jacoby was not present at any time in the New York Court on June 28, 1991, when I discovered the Disputed Documents.

88. This is an important point because two such "personal knowledge" affidavits create the false impression that Mr. Jacoby was present along with Mr. Baer and therefore able

to corroborate what Mr. Baer said, whereas Mr. Jacoby was not.

89. Moreover, others who where present with Mr. Baer, Ms. Hope Kerstman, of Weil, Gotshal & Manges, and Christopher Parlo remain silent and have never been called as witnesses.

90. At no time before or after January 9, 1992, did Mr. Baer, or Mr. Jacoby, the partner-in-charge of the New York Action, for Weil, Gotshal & Manges have the common decency to tell Justice Moskowitz -- or Your Honor on July 7, 1992 -- that such affidavits are false and that both had subsequently changed their versions of what had happened.

91. It is reprehensible that neither Mr. Baer nor Mr. Jacoby brought the false statements in their affidavits of July 3, 1991, to the attention of Justice Moskowitz before she rendered her decision on January 9, 1992, and even more reprehensible that they continued to rely upon such false statements to induce this Court to grant a stay.

92. Mr. Jacoby's propensity to use false attorneys' affidavits continued three days after receiving the stay granted by this Court in the form of his affidavit of July 10, 1992, submitted to Justice Moskowitz in support of his application to have myself and my attorney incarcerated and fined for contempt.

93. The Jacoby "personal knowledge" affidavit falsely states that the Disputed Documents placed in front of me were "plainly identified as defendants' counsel's file memoranda...." (Jacoby Aff. 7/10/92, ¶ 7, annexed hereto as Exh. J.)

94. Those documents by no means were "plainly identified."

95. I had no idea what documents were or had been placed on the conference table where I was expected to sit, unless I was intended to read them, and the nature of their contents made it impossible for me to focus on much of anything other than the outrageousness of what they said about me. (Lipin Testimony 7/8/91, pp. 58, 77-80, 83-84, 90-91, Exh. L.)

96. Mr. Jacoby's affidavit also falsely states that "at that time" I was "employed by her counsel as a paralegal." (Jacoby Aff., 7/10/92, ¶ 7, annexed as Exh. J.)

97. However, Mr. Jacoby knows that I was not "employed" as a "paralegal" on my own case and that I was present in the Court in my capacity as a client only.

98. Mr. Wisehart hired me to assist in the office in an administrative capacity in March 1990, when the only employment available to me was that of a weekend receptionist for Roadrunners at $6.15 per hour. Mr. Wisehart hired me as an act of compassion because I was financially and psychologically unable to subsist any longer as a result of the annihilation of my career by defendants in retaliation for the investigation I requested to be made concerning defendant Bender's victimization of female Red Cross employees.

99. About a year later, shortly before discovering the documents, Mr. Wisehart spoke to me about beginning to acquire training as a paralegal, because of the dead end of my professional career, but it was and is clearly understood that, with regard to my own case, my function is strictly limited to be that of a client only.

100. Further, even were I to be regarded as a novice paralegal when I discovered the Disputed Documents in front

of me on June 28, 1991, knowing nothing about rules applicable to "work product" documents, a term I had never even heard, the normal reaction would be to obtain the advice of an attorney about what had been placed in my possession, and that is what I did.

F. THERE WERE NO "STOLEN DOCUMENTS"

101. I emphatically did not "steal" the Disputed Documents as falsely stated in Mr. Jacoby's affidavit of July 7, 1992, to induce this Court to grant a stay. (Jacoby Aff., 7/7/92, ¶ 8, p. 5, Exh. O.)

102. My possession of the documents was for the limited purpose of obtaining advice from counsel and for my own protection.

103. When I informed Mr. Wisehart, I was informed that the issue is a complex one, especially because it involves the unsettled doctrine of waiver, and he desired to obtain a second opinion.

104. Mr. Wisehart proceeded to do so that weekend, and did not himself even look at the papers until Edmund S. Purves, Esq., gave his opinion that it would be desirable for them to do so in order to evaluate the situation properly. (Wisehart Aff. 7/8/91, ¶¶ 28-32, Exh. P.)

105. On the second business day after I discovered the Disputed Documents on June 28, 1991, they were returned to Mr, Jacoby, with copies retained in order to perfect my claim of right, as advised by counsel. (Id., ¶¶ 59-62, 67 & 79.)

106. As Mr. Jacoby is well aware with respect to his false statements, Justice Moskowitz specifically found to the

contrary with respect to my sworn testimony taken before her on July 8, 1991. As Justice Moskowitz stated on the record on July 11, 1991, (TR 7/11/91, pp. 146-7, annexed as Exh. Q):

> "The Court[Justice Moskowitz]: Counselor, if I were the plaintiff -- her testimony isn't that she stole papers, but that she sat down and the papers were in front of her, right?"
>
> "Mr. Jacoby: Your Honor, these were papers on a counsel [conference] table. She didn't put them there. Not her lawyer. The lawyer on the other side."
>
> "Now, I don't believe for one minute that this pile of papers was sitting directly in front of her in a neat pile facing her four inches off the table."
>
> "The Court[Justice Moskowitz]: That is the testimony."
>
> "Mr. Jacoby: I understand that."
>
> "The Court[Justice Moskowitz]: You didn't bring anybody in to say that the papers were scattered, or the papers were on the other side of the table, or the papers were at the foot of the table, or the papers were in any other location. If I choose to believe the plaintiff then her testimony, and I was just looking for it, is that she sat down before argument started and when she sat down, right in front of her, four inches from the edge of the table, was a neat stack of papers." (Emphasis added.)

107. Thus, Justice Moskowitz determined after hearing my sworn testimony that I was not guilty of having "stolen" the Disputed Documents contrary to the statement in Mr. Jacoby's "personal knowledge" affidavit of July 7, 1992, used to induce this Court to grant a stay. (Jacoby Aff. 7/7/92, ¶ 8, p. 5, Exh. O annexed hereto.)

108. The same Jacoby affidavit also falsely states that the documents were used "to attempt to obtain a 'shotgun' settlement from defendants...."

109. The quoted word "shotgun" was never used and the return of the documents was never conditioned upon defendants' agreement to a settlement. (See Wisehart Aff. 7/8/91, Exh. P.)

110. The demand that defendants take corrective action regarding misconduct contrary to Red Cross policy, by that agency's Chief Executive Officer, and that they consider a settlement as being in the best interest of the Red Cross, such action was required to perfect my rights pursuant to 42 U.S.C. § 1986, I am advised, as a necessary basis for my claim thereunder as pleaded in Count IV of the Amended Complaint as filed in this Court, a claim which is not part of the New York action.

111. The outrageous and false statements in the inconsistent Jacoby and Baer affidavits were relied upon by this Court at a time when neither I nor my attorney in charge was present to respond to the prejudicial statement by this Court referring to the documents as the "purloined privileged documents" (TR 28).

112. The "purloined" terminology used by this Court was exploited by Mr. Jacoby to the fullest for prejudicial effect in subsequent proceedings in the New York Court, as might be

expected.

113. Unless the prejudice stemming from the false Jacoby and Baer "stolen documents" affidavits is stopped, I despair of ever receiving fair treatment or Due Process through the judicial system.

114. Finally, I desire to raise with Your Honor the existence of a distant relationship to a person involved in extended litigation over many years before Your Honor, Marc Rich, who is a second cousin.

115. While I have only met Mr. Rich once in my life (at a funeral), I am sure that through their investigatory procedures, defendants have learned of the existence of the relationship, and I do not doubt that they would contrive to use the existence of the relationship to the attention of the Court in order to cause further prejudice to me, if possible. I therefore respectfully ask Your Honor to consider whether the existence of such relationship would affect this Court's attitude toward me.

116. Mr. Jacoby's deliberate use of false affidavits in obtaining the stay this Court caused substantial prejudice to me. The young lawyer from Wisehart & Koch who was forced to appear on the same day in response to the Order to Show Cause with virtually no notice or knowledge about the case, was unaware of the false Jacoby and Baer affidavits dated July 3, 1991, that had been knowingly attached as Exhibits B and C to the Order to Show Cause, and was unaware of the inconsistencies between the affidavits of July 3, 1991, and their subsequent statements.

117. This Court's reference to the Disputed Documents as "purloined" on July 7, 1992 (TR 28), is a direct outgrowth of such misconduct by Mr. Baer.

118. Reliance upon false and defamatory statements about me has been a continuing course of conduct by Mr. Jacoby both in the New York Court as well as in this Court.

119. Mr. Jacoby in his affidavit of October 29, 1991, submitted to Justice Moskowitz (also on "personal knowledge") falsely charges me with "gross misconduct" in "stealing" the documents.

120. The use of such false and defamatory statements in affidavits by Mr. Jacoby was deliberate, intentional and with personal malice toward me, and out of bounds under permissible judicial procedure.

121. Defendants' continued reliance upon the perjured Baer and Jacoby affidavits in connection with their application to this Court for an Order to Show Cause constitutes willful misconduct, deception and fraud by attorneys, I am advised, in violation of Section 487 of the New York Judiciary Code.

122. The statements in the "personal knowledge" Jacoby affidavit sworn to on July 7, 1992 to obtain a stay from this Court, coupled with his "personal knowledge" affidavit sworn to July 10, 1992, used to obtain the Order to Show Cause from Justice Moskowitz, establish beyond any doubt that Mr. Jacoby and his firm fall into the category covered by Disciplinary Rule 5-102(A). Jacoby is a lawyer who knows that lawyers in his firm "ought to be called as a witness in behalf of his client," a situation requiring the mandatory disqualification of his law firm.

123. I am told by my counsel that the failure of Justice Moskowitz to require testimony by Messrs. Baer and Jacoby, as requested, is a violation of well settled standards of due process and should not have been countenanced.

124. The statements in the Baer and Jacoby affidavits themselves exemplify as never before the necessity for the disqualification of Mr. Jacoby (and his firm) because they make directly applicable the Disciplinary Rule 5-102(A) of the Code of Professional Responsibility.

125. Mr. Jacoby was also involved in further false statements misleading to this Court by his partner Kevin P. Hughes.

126. At argument on the Order to Show Cause on July 7, 1992, when the Court inquired whether anything had happened after I filed my initial Verified Complaint on June 17, 1992, and the Amended Verified Complaint on June 23, 1992 (TR. 7/7/92, p. 8, Exh. C.)

127. To Your Honor's inquiry, Mr. Hughes falsely responded that

"... unequivocally nothing happened." (Ibid.)

128. In making that misrepresentation to Your Honor, Mr. Hughes succeeded in concealing from this Court Mr. Jacoby's attempt to try his case in the press between the filing of the initial and amended verified complaints.

129. New York Newsday carried an item concerning my case on June 19, 1992, at page 45 (Exh. R annexed hereto.)

130. The Newsday item noted that both my attorney and I declined to comment.

131. However, the Newsday news item stated

> Mark A. Jacoby, a lawyer for the Red Cross who has also been named in the lawsuit, said he planned to seek an immediate dismissal of the case ...

> While Jacoby would not respond to the specific charges, he did say Lipin failed to follow the agency's regulations for handling complaints, including allegations of sexual harassment.
>
> "There's a grievance procedure available under the American Red Cross procedures which she [plaintiff] did not invoke," Jacoby said.
>
> Mr. Jacoby is further quoted as saying
>
> "Indeed, if she [plaintiff] had been harassed she could have pursued with the agency a grievance procedure."
>
> Attempts to reach Lipin failed. Lipin's lawyer, Arthur M. Wisehart, refused to comment.

132. The statements of Mr. Jacoby to the press were both false and prejudicial.

133. As Mr. Jacoby well knew, I had repeatedly sought to obtain an investigation of my claims of sexual harassment and retaliation by the Chief Executive Officer of the New York Red Cross, and had raised that issue with every one in the power structure available to me but without effect. (Amended Verified Complaint ¶¶ 218-228.)

134. The false statements to the press by Mr. Jacoby are an important part of the new allegations in the Amended Verified Complaint.

135. However, when Your Honor inquired whether there had been any change in circumstances between the time of filing of the original complaint on June 17, 1992, and the amended complaint on June 23, 1992, Mr. Hughes falsely

represented to Your Honor that "unequivocally nothing happened," and failed to disclose to Your Honor Mr. Jacoby's intervening statement to the press that formed a part of the pleading in the amended complaint. (Tr. 7/7/92, p. 8, Exh. C.)

G. THE DISPUTED DOCUMENTS WERE DELIBERATELY PLACED WHERE THEY WERE FOR PURPOSES OF ENTRAPMENT OR INTIMIDATION

136. As stated above, I have come to believe that the Disputed Documents were deliberately placed by Mr. Baer where he knew I would see and read them.

137. My belief in such misconduct is supported by the deliberate falsity of the Baer affidavit in other respects, and by defendant Jacoby's continuing reliance upon an affidavit prepared by his associate that he himself now concededly believes to be false.

138. This belief is also reinforced by the fact that not once during the entire day he spent in New York County Courthouse on June 28, 1991, did Mr. Baer inquire after the documents.

139. I was curious whether Mr. Baer would ever ask about the documents since the circumstances suggested to me that they had been deliberately placed where they were so that I would read them and become intimidated.

140. The fact that he failed to do so is evidence that his purpose was deliberate entrapment.

141. Mr. Baer necessarily was conscious of the fact that he had the documents with him when he took them to the

New York County Courthouse on June 28, 1991.

142. In the first place, in size alone, 200 pages of documents would fill his briefcase to an extent that he would be aware of both when he had them, and also when he no longer had them.

143. Second, the unusual and highly specialized nature of the documents would cause Mr. Baer to be highly aware of having the documents with him.

144. The documents were in no way involved in the proceedings in Court that day, either with regard to the matters before Special Referee Birnbaum, nor were they needed for or involved with the subsequent deposition (in the "EBT room") of Barnet Deutch. The deposition of Barnet Deutch was not being taken by Mr. Baer, but by
Mr. Wisehart.

145. Third, in view of the specialized nature of the documents, in order even to have them with him on that day, Mr. Baer would have had to have arranged to have the documents copied from his firm's files in advance. The reference to the return of the "original documents" in Mr. Baer's affidavit of July 3, 1991, is a further falsity (Baer Aff., ¶ 13, Exh. K); what I saw were not the "original" papers, but copies that had been made. The originals were in the possession of Weil, Gotshal & Manges at all times, to the best of my knowledge.

146. Further, Mr. Baer's consciousness that he had the documents would have been reinforced by his direct and physical act of removing them from his briefcase, and from any envelope or folder in which they were likely to be have been segregated for the purpose of separating them from the documents that were needed for the proceedings that day, when

Mr. Baer placed them face up at my usual location at the conference table.

147. The documents were so placed that the page on top must have been known by Mr. Baer to be the one that would have the most devastating and distracting effect on me personally.

148. Having placed the documents where I was expected to sit at the conference table, when I was not present to observe what was happening, Mr. Baer necessarily must thereupon have walked around to the other side of the table with his briefcase -- and with his other papers still in his possession -- accompanied by Ms. Hope Kerstman of his firm, who was present as his assistant, and his co-counsel Mr. Parlo of Morgan, Lewis & Bockius. (Lipin Testimony, 7/8/91, pp. 24-25 & 27, Exhibit L.)

149. It therefore is simply not conceivable that Mr. Baer made a mistake in putting the documents where I found them, nor is it conceivable that Mr. Baer thereupon proceeded to forget about them completely, having had so much direct and physical involvement with the documents on that day.

150. Mr. Baer's purported forgetfulness about his possession of the documents extended well beyond Friday, June 28, 1991, according to his affidavit.

151. Mr. Baer asks the Court to believe that when he returned to his office that day, he did not unpack his briefcase and did not become aware that he failed to bring 200 pages of specialized documents back with him. Moreover, according to his affidavit of July 3, 1991, Mr. Baer professed that his forgetfulness about highly important and bulky documents, that he had in his possession, or his failure to bring them back to the office with him, continued "until Mark A. Jacoby, a partner

of the firm, advised me that Mr. Wisehart had returned the original papers to him at a meeting at Mr. Wisehart's office on Tuesday, July 2, 1991." (Baer Aff. 7/3/91, ¶ 13, Exh. K.)

152. The lack of credibility in such statement by Mr. Baer is glaringly apparent.

153. The high intelligence quotient claimed by lawyers hired by prestigious law firms such as Weil, Gotshal & Manges is known to the Court.

154. For so purportedly intelligent a lawyer to ask the Court to believe that he had totally forgotten about having taken 200 pages of highly important documents to Court with him four days earlier, is an imposition upon the Court's intelligence.

155. For such forgetfulness, the remedy available to the Red Cross would be a malpractice claim rather than the suppression of my right to litigate the issues of sexual harassment and retaliation against defendant Bender.

156. Knowledge of human nature tells us that Mr. Baer did not lose the documents, or forget about them, as he claims, but instead deliberately placed them where they were found by me, fully intending that I see them, and that he did so with the prior knowledge and approval of his supervisor, Mr. Jacoby, fully intending, thereupon to resort to the "stolen document" gambit.

157. Having seen the documents, the devastatingly personal nature of the material instantly visible assured that my attention would be encaptured, and that I would read them.

158. The motive that fueled the actions of Mr. Baer was entrapment and/or the intentional infliction of mental anguish and emotional distress, not gross carelessness and

forgetfulness.

159. Such also were the motives of Mr. Jacoby and his clients. Had Mr. Baer been as careless or forgetful as he pretends to have been appropriate action would have been taken regarding such derelictions long ago.

H. EXTENUATING CIRCUMSTANCES PREVIOUSLY NOT CONSIDERED

160. I am advised that whether such conduct would waive any claim of confidentiality would be determined under Federal Law in my action in this Court, and that I would be entitled to seek the information contained in such work product documents under discovery pursuant to Fed.R.Civ.P. 26 (b)(3).

161. The determination of Justice Moskowitz on January 9, 1992, therefore would not be applicable to the determination to be made by this Court under Federal Law.

162. Extenuating circumstances indicative of the appropriateness of a different result in this Court is shown by the fact that an eminent forensic psychiatrist, Dr. Stanley E. Portnow, based upon his examination of me as a victim of severe and continuing acts of sexual harassment and retaliation, has diagnosed my condition as Post-Traumatic Stress Syndrome.

163. Post-Traumatic Stress Syndrome involves the following clinical symptoms (American Psychiatric Association Diagnostic Statistical Manual, DSM-III, Third Edition, p. 236-7):

> "After experiencing the stressor, many [individuals] develop symptoms of excessive autonomic arousal, such as hyperalertness,

exaggerated startle response, and difficulty falling asleep. Recurrent nightmares during which the traumatic event is relived and which are sometimes accompanied by middle or terminal sleep disturbance may be present. Symptoms characteristic of Post-traumatic Stress Disorder are often intensified when the individual is exposed to situations or activities that resemble or symbolize the original trauma ...." (Emphasis added.)

164. Actualization of the original trauma originally suffered resulted from my seeing the documents, I was extremely upset at what I saw. (Lipin Testimony, 7/8/91, pp. 58, 77-80, 83-84, 90-91, Exh. L.)

165. Venomous, defamatory and hateful statements about me fabricated by the defendants and their counsel, with the purpose and intent of destroying me and my career, leaped out from the documents, preempting my attention from all else.

166. I was plunged into deep despair and depression, and that evening I could not sleep.

167. When I re-read what was said about me the next night, Saturday, June 29, 1991, I was so psychologically overcome that I experienced an imploding and crushing wave of pain in my chest, severe difficulty in breathing, and gripping anxiety. I feared that I was going to have a heart attack.

168. Distraught and unable to sleep, I did not know if I would be able to go on, psychologically or physically.

169. I called my father in Sweden. My father is a Harvard trained neuro-psychiatrist formerly on the staff of New York University and most recently on staff of Sweden's

foremost teaching and research hospital, because of my need for advice concerning the management of my state of extreme agitation.

170. My father said that my ongoing psychological trauma could trigger severe medical conditions, and that I should be extremely careful.

171. I also spoke with Dr. Stanley L. Portnow, an eminent forensic psychiatrist. When I told him about my emotional distress resulting from what I had seen, Dr. Portnow said that he would like to see the documents in order to better understand the cause of their effect on me, I said that I was unable to provide them or tell him what they said.

172. Psychological torture is a tactic used by politically potent adversaries against women who struggle for human rights and who stand up against violations of the human body and or their dignity as a woman and as a human being.

173. Amnesty International has recently stated that psychological and physical trauma inflicted on women who struggle for human rights is on the rise throughout the world including the United States.

174. In view of their location, their nature, and the subsequent developments involving the documents, I have no doubt but that they had been placed where they were deliberately to entrap or intimidate me.

I. APPLICABILITY OF THE WAIVER DOCTRINE

175. I am informed that, as a partner in a firm of the standing of Weil, Gotshal & Manges, Mr. Jacoby is well aware of the doctrine of waiver of a claim of confidentiality as it applies to an attorney's work product.

176. Defendants produced in discovery a Red Cross Memorandum that shows that the Red Cross defendants also were well aware that the exposure of such documents to an adversary would result in a waiver of any claim of confidentiality.

177. Signed by Stephen H. Richards, the Secretary and General Counsel of the American Red Cross, and dated August 29, 1988, the Memorandum was sent by defendant Bender with a cover letter dated September 16, 1988, to defendant Jesse D. Wolff, of Weil, Gotshal & Manges. (Bender Ltr. 9/16/88: Red Cross Memorandum 8/29/88, annexed hereto as Exhibit S.)

178. This Red Cross Memorandum warns staff and attorneys to --

> "10. Avoid situations that may result in unintentional waiver of the privilege. Examples of unintentional waiver of the privilege include the possibility that the disclosure of one part of the privileged document may make the entire document accessible to the opposing party. Additionally, the disclosure of one communication may require production of all communications on that subject matter." (Exh. S, p. 3, emphasis added.)

179. Thus, by their own admission, defendants have created a waiver situation in making the Disputed Documents available to me and justice will be denied if they are not required by this Court to produce the documents in discovery.

180. The fact that defendants have kept this Court in the dark about relevant facts is shown by the following statement on July 7, 1992, in connection with the Order to Show Cause (Tr. 7/7/92, p. 17, Exh. C):

> "The Court: Well, I don't know that it [plaintiff's testimony] needed to be contradicted. There is no claim, is there, that she [plaintiff] was delivered those documents? There is no claim, is there, that she thought she [plaintiff] had the right to read those documents or to obtain possession of those documents?"

181. On the contrary, my Amended Verified Complaint specifically makes such a claim in paragraphs ¶¶ 178-199, 260- 270, 273, & 277.

182. The references to the Disputed Documents in the Verified Complaint and the Amended Verified Complaint do not go beyond information already in the public domain.

183. The complaints do not "embody" the Disputed Documents; the references in the complaint and amended complaint are general, less specific, and do not go beyond the public domain in the State Action previously created by Mr. Jacoby himself as contained in the transcripts of the hearings in the New York Action on July 8 and 11, 1991, and in other public references to the documents by defendants' counsel themselves. (Wisehart Aff. 8/4/92, Exh. I.)

184. In other words, the references to the documents in the complaint and amended complaint do not go beyond information already in the public record, as Mr. Jacoby knows full well, and violate neither the plain words nor the intent of the Orders of Justice Moskowitz of January 9, 1992.

185. Contrary to Mr. Jacoby's claim in paragraph 16 of his affidavit of July 7, 1992, my Verified Complaint and Amended Verified Complaint were not filed with any malicious intent, but to seek a remedy for the injuries that have been inflicted upon me by defendants.

WHEREFORE, the Order of July 7, 1992, should be vacated.

/s/

Joan Carol Lipin

Sworn to before me this

6th day of October, 1992:

/s/

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOAN CAROL LIPIN, Plaintiff,	INDEX NO. 15653/89
	JUSTICE KARLA MOSKOWITZ
- against -	AFFIDAVIT OF JOAN CAROL LIPIN IN SUPPORT OF PLAINTIFF'S CROSS-MOTION TO DEFENDANTS' ORDER TO SHOW CAUSE DATED JULY 10, 1992
ROBERT M. BENDER, JR., THE AMERICAN NATIONAL RED CROSS and AMERICAN RED CROSS IN GREATER GREATER NEW YORK,	
Defendants.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

1. I am the plaintiff in the above action and respectfully submit this affidavit in support of my Cross-Motion to have Karla Moskowitz, J.S.C., recuse herself and be disqualified from further participation in this litigation.

EXHIBIT E

2. The basis for my request for recusal is twofold:

(a) First, personal bias or prejudice; and

(b) Second, personal knowledge and misuse of disputed evidentiary facts.

3. Recusal is also requested in order to avoid any further impropriety or appearance of impropriety.

Personal Bias or Prejudice

A. Failure to Act on Prior Motions Regarding Obstruction of Justice and Disqualification of Defendants' Counsel

4. Blatant bias was shown by Justice Moskowitz in dismissing my complaint without ever addressing the relief requested in my Cross Motion filed on May 2, 1991, as renewed by my Cross-Motion dated October 23, 1991, to strike defendants' answer in the case and enter judgement against them because of repeated instances of obstruction and discovery abuse, including willful destruction of evidence in anticipation of litigation.

5. Had my prior motion to strike been granted, it would not have been necessary for the Court even to have addressed the issues created by defendants regarding the highly unusual circumstances herein which defendants' own counsel had placed documents on a conference table in this Court, as now admitted by Mark A. Jacoby (in marked contrast to the false affidavit of his associate, Lawrence J. Baer, dated July 3, 1991), at a location on that conference table in a public hearing

room at which it was known that I would be sitting.

6. In his affidavit dated July 10, 1992, Mr. Jacoby has now finally admitted that an attorney from his firm had placed open, unsealed documents about me on the conference table in the location at which I customarily sat. However, Mr. Jacoby has not as yet withdrawn Mr. Baer's affidavit, nor has he apologized to the Court and to me for his having deceived the Court by relying upon a false affidavit in this proceeding.

7. Had my Cross-Motion been considered, the misdeeds of defendants which gave rise to it would have been taken into account in determining properly the context of my own action in examining the documents that had been placed in front of me.

8. The prior discovery abuse of defendants was of a willful, heinous and intractable kind as shown in my Cross-Motion dated October 23, 1991.

9. The deliberate destruction of evidence was involved, as well as actions taken by defendants to aid and abet the absconding of a key witness, Barbara Fletcher, who herself had destroyed the documentary evidence in question, while defendant Bender's assistant and a Red Cross employee.

10. Mr. Jacoby's firm was directly involved in many of such instances of obstruction of justice and heinous discovery abuse. However, Justice Moskowitz nevertheless failed to act on or decide the issues raised by my Cross-Motion, clearly showing bias and prejudice in failing to decide applications made by me.

11. Defendants' improprieties also included reliance upon a false and perjured affidavit by the Associate General Counsel of the American National Red Cross, Joan Elise

Dubinsky.

12. However, despite such heinous behavior clearly recognized by the Court (Tr. 5/13/91, pp. 37-40) no action was taken, even though the falsity of the Dubinsky affidavit was directly involved in the activities of defendants' lawyers intended to make it impossible for me to learn the whereabouts of Barbara Fletcher in California so that her deposition could at long last be taken.

13. Although the repeated instances of willful discovery abuse by defendants and their counsel clearly were activities of the most heinous kind, Justice Moskowitz, as stated above, failed to take any action with respect thereto, even though such activities violated three prior Court Orders, and even though my Cross-Motion to strike defendants' answer and disqualify their counsel was pending at the time of the Court's decision mischaracterizing subsequent conduct on my part.

14. Personal bias or prejudice is also shown by the statement of Justice Moskowitz, in granting defendants' application to dismiss my complaint, that (Tr. 1/9/92, pp. 9-10):

> (a) she was aware of how important the case was to me, and
>
> (b) that she was aware that I have financial problems and meager resources, as a result of the injury sustained from defendants' conduct, yet she was going ahead to dismiss the complaint, thereby condoning defendants' egregious and heinous abuses in obstruction of justice without even considering them.

15. Additional evidence of personal bias or prejudice are also shown by the punitive excessiveness of what the Court did; the fact that, as I am informed by counsel, the only precedent decision relied upon by the Court as basis for her action does not in itself support such action; the excessiveness and inflammatory nature of the language used by the Court to grant defendants' application for an extreme form of relief far exceeding the only appropriate penalties allowed under CPLR § 3103(c), when a simple order of preclusion or suppression that would have been adequate to preserve any claim of privilege; and the fact that Justice Moskowitz has now entertained defendants' additional application to impose even more extreme penalties upon me and my counsel for attempting to obtain protection and a determination of my constitutional rights in the Federal Court.

16. Personal bias or prejudice is also shown by the fact that Justice Moskowitz castigated both me and my counsel for alleged misuse of the information contained in the discovered documents in order to protect my rights and interests; yet Mr. Jacoby was permitted by Justice Moskowitz to examine me at length on the public record concerning the contents of said documents, adding to my shame, humiliation, and injury from mental anguish and emotional distress caused by the false statements therein, while at the same time penalizing me for attempting to defend myself against such calumnies.

B. Failure to Act on My Motion to Disqualify Weil, Gotshal & Manges

17. Personal bias or prejudice is shown by Justice Moskowitz's willingness to rely upon mere affidavits and statements of attorneys for defendants on disputed fact issues, in a matter in which they should have been produced as direct witnesses and made available for cross examination.

18. Justice Moskowitz doubtless was aware that the only proper action was in requiring such counsel to withdraw as counsel for defendants or be disqualified under the Disciplinary Rules of the Code of Professional Responsibility, DR 5-101, DR 5-102, but took no action to do so.

19. Personal bias and partiality is shown by the Court's failure ever to act upon my Cross-Motion to disqualify counsel for defendants from this litigation. The Cross-Motion for leave to renew motion to strike defendants' answers, disqualify Weil, Gotshal & Manges and for other relief, dated October 23, 1991, remained pending at the time that the decision to dismiss my complaint was made.

20. The Motion to disqualify Weil, Gotshal & Manges still remains pending without ever having been acted upon by Justice Moskowitz.

21. The extended record in this case shows that, Jesse Wolff, a Trustee of defendant ARCGNY, has permitted his law firm, Weil, Gotshal & Manges, willfully and unreasonably to continue in this litigation despite that law firm's conflict of interest due to its dual representation of defendants Bender and ARCGNY, and because of the dominate fiduciary duties of Mr. Wolff as a Trustee of the American Red Cross in Greater New York that would require him to recommend that appropriate action be taken against defendant Bender based upon his violation of Red Cross policies and procedures, as well as the Civil Rights Laws of the United States.

22. The mandatory requirement of disqualification of Weil, Gotshal & Manges is further shown by the Jacoby "personal knowledge" affidavit made in support of the Order to Show Cause dated July 10, 1992. (Jacoby Aff. ¶ 1.)

23. When confronted by a "personal knowledge" such affidavit by an attorney in support of an application of an Order to Show Cause, the reaction of the Court should have been immediate and instantaneous disqualification.

24. The statements in paragraphs 6-9 of the Jacoby affidavit, concerning the circumstances in which the documents came into my possession, completely discredit the affidavit on the same subject by Lawrence J. Baer, Mr. Jacoby's associate, dated July 3, 1992.

25. However, the false Baer affidavit on which Mr. Jacoby was relied upon by Mr. Jacoby in connection with what led to the Court's decision of January 9, 1992, and the false Baer affidavit has not been withdrawn.

26. In view of Mr. Jacoby's concession that the documents were placed in front of me at the location in which I usually sat at the conference table in the hearing room of Special Referee Birnbaum, it is time for Justice Moskowitz to face up to the fact that those documents were deliberately placed there by Mr. Baer with the deliberate intent of either intimidating me or derailing this litigation (or both).

27. The documents had absolutely nothing to do with the matter before Special Referee Birnbaum.

28. There was no occasion whatsoever for Mr. Baer to have the documents with him that day other than to plant them in front of me at the location where I usually sat at the conference table.

29. Not only did the papers have nothing to do with the hearing before Mr. Birnbaum, but also it is not conceivable that a lawyer from the firm of Weil, Gotshal & Manges would be guilty of the gross carelessness of leaving the papers there

by mistake.

30. The conclusion that the purpose and intent of Mr. Baer to entrap me therefore is inescapable.

31. Also inescapable is the conclusion that Mr. Baer deliberately perjured himself in his affidavit, nor is it likely that he would have engaged in such a stratagem to attempt to intimidate me and deceive the Court without the expressed approval of his supervisor, Mr. Jacoby.

32. Mr. Jacoby's sworn statement that I was guilty of having stolen documents that were deliberately placed in front of me is a further instance of perjury which should be tried to a jury. (Jacoby Aff. 10/29/91, ¶ 2.)

33. The mandatory nature of the disqualification of Mr. Jaocby and his law firm as witnesses on this issue is shown by Luskin v. Seone, Supreme Court, Nassau County, reported in today's New York Law Journal, July 21, 1992, p. 25, stating

> "It is axiomatic that the roles of advocate and witness are inherently inconsistent ...."

34. My right to a jury trial on Mr. Baer's involvement in deliberately placing the documents in front of me and then filing a false affidavit requires disqualification of Weil, Gotshal & Manges without further procrastination on the disqualification issue and before these proceedings go any further.

35. Failure to act on the disqualification issue constituted impermissible personal bias and prejudice by Justice Moskowitz, an effect that will be rendered even more egregious, contrary to my right of Due Process, if this same Judge is now permitted to act upon the Order to Show Cause

dated July 10, 1992, which defendants have brought, through the self-same disqualified law firm, in connection with the commencement of my Federal Case.

36. Bias and prejudice against me is exemplified also by the carelessness of Judge Moskowitz in the manner of rendering her decision of January 9, 1992, and the excessive and abusive language used by her at the time.

37. The direct result was to cause Judge Sand to amplify the effect of such bias and prejudice in comments made by him on the hearing on defendants' application for an Order to Show Cause, without even reading the Verified Complaint in the Federal Action, on July 7, 1992, an application that the attorneys from Weil, Gotshal & Manges insisted on prosecuting at a time when they knew that my attorney, Arthur M. Wisehart, was away on vacation and unavailable.

38. The injury to me as a result of such bias and prejudice will have a snowballing effect as Justice Moskowitz will be forced to seek to justify her prior improper actions in connection with the Order to Show Cause that she signed on July 10, 1992, putting me and my counsel in serious peril of financial and personal risk and loss of liberty.

39. A further ground mandating disqualification is found in Disciplinary Rule 5-101(A). Mr. Jacoby and his firm are disqualified under Disciplinary Rule 5-101(A) because he together with Messrs. Baer and Wolff of his firm themselves are named defendants in my Federal Action. Because they are named defendants, their own financial, business, property or personal interests of these lawyers directly conflict with those of their Red Cross clients and require disqualification.

40. The palpable conflict of interest also is shown by the fact that the American National Red Cross pointedly declined to join in with Mr. Jacoby's applications for an Order to Show Cause, either before this Court, or before Judge Sand.

C. Personal Knowledge of Disputed Evidentiary Facts

41. A further ground for recusal or disqualification is further shown by the fact of personal knowledge of disputed evidentiary facts concerning the proceeding possessed by Justice Moskowitz. Disqualification is required in such circumstances under Section 100.3 (c)(1)(i) of the Rules of the Chief Administrator of the Courts.

42. At the hearing on the application of defendants to dismiss, Justice Moskowitz read information about me prepared by counsel for defendants containing highly inflammatory, prejudicial and false manufactured statements without making them a part of the record.

43. No opportunity was afforded me to present evidence showing the falsity of such statements.

44. The effect of such statements, read by the Court on an ex parte basis, therefore, will linger and will cause personal bias and prejudice against me to an extreme degree unless the Judge reading such papers is recused or deemed disqualified from any further participation in these proceedings.

D. Political Factors Involving Bias and Prejudice

45. By deliberately creating such a diversionary tactic to intimidate or entrap me, Mr. Jacoby and his clients acted with foreknowledge that they could likely influence Justice Moskowitz to dismiss this litigation because of political considerations.

46. Only naked political power or influence can account for the fact that a matter for which a simple order of preclusion or suppression would suffice, Judge Moskowitz complied with Mr. Jacoby's request to dismiss my claim of sexual harassment so that it could not go before a jury, which is my constitutional right.

47. The reality of the use of political power to influence the result on the part of the Judge is made clear by the fact that Justice Moskowitz, in doing Mr. Jacoby's bidding by dismissing my case, had direct knowledge that I have had to contend with the entire gambit of every conceivable kind of abusive discovery tactics pervasively perpetrated against me from the beginning of this case, and in fact from long before, when relevant documents pertaining to me were shredded by Bender's assistant, Fletcher, as she admitted in her deposition.

48. The presentation of the ex parte Order to Show Cause by Mr. Jacoby and his firm on July 10, 1992, threatening extremely punitive results, is indicative of the continuing confidence of Mr. Jaocby's firm and his clients in their ability to improperly influence Justice Moskowitz, and his continuing confidence that she will never be able to bring herself to act upon the long-pending prior motions to disqualify Mr. Jacoby's firm and strike defendants' answers for persistent discovery abuse and obstruction of justice orchestrated by Mr. Jacoby.

49. I am informed that the Rules of the Chief Administrator of the Courts require a Judge to "disqualify himself or herself in a proceeding in which his or her impartiality reasonably might be questioned...." (Rules §100.3 (c)(1).)

50. As shown above, substantial direct evidence of bias and prejudice exists herein on the part of the Judge, as well as evidence of personal knowledge of disputed evidentiary facts directly involving me and affecting the outcome of my case.

51. Disqualification is required because at a minimum the impartiality of the Judge is "reasonably" subject to question. When that occurs, disqualification is mandatory.

52. It has been said by Thoreau, I believe, that occasionally circumstantial evidence is too strong to be refuted, such as when there is "a trout in the milk."

53. This is a "Trout in the Milk" case. Justice, the product dispensed through the judicial system, has been watered, tainted, or otherwise adulterated by the political power of the defendants in this case.

54. Bias and prejudice by the judge is shown by the fact that she has permitted Mr. Jacoby to follow the time-honored technique of using chicanery in a sexual misconduct case to convert the accuser into the accused.

55. Justice Moskowitz also was fully aware that the documents themselves were about me personally, and that the circumstances in which they were placed in front of me were highly unusual.

56. In punitively seeking to block my constitutional right to trial by jury on my claim of sexual harassment, Justice

Moskowitz assumed that I would instantaneously know what the right thing to do, without receiving advice from anyone else, notwithstanding the fact that it took a person who is trained not only as a lawyer but also a Judge many months to reach a decision involving circumstances so unusual.

57. Justice Moskowitz fails to mention any rule of law or procedure under which a person in training as a paralegal, or even a fully qualified lawyer or judge, who is directly and personally affronted by the false contents of documents that have been placed in front of her by lawyers on the other side is required to disregard the trauma and injury caused to her, and meekly pretend that the incident never happened.

58. Justice Moskowitz appears to have harbored a prejudice against me as a novice paralegal (Tr. 1/9/92, p. 5).

59. However, Justice Moskowitz knew full well (a) that the statements in the documents involved me personally, (b) that I had been exposed to training as a paralegal only briefly, as an act of compassion by my attorney when I could not obtain other than the most menial employment as an outgrowth of defendants' conspiracy to defame me, as aided and abetted by their attorneys, and (c) that even if I had been fully knowledgeable about this area of the law, in the split-second in which I had to make a decision, the only advice that could be prudently rendered would be to get an opinion from an experienced attorney, which is what I have been told is a rule that paralegals must always follow when such issues arise.

60. Mr. Jacoby's egregious reliance on the Judge's one-sided willingness to do his bidding is shown by his affidavit to deprive me of my constitutional right to counsel, through disqualification of my attorneys, indicative of the confidence that Mr. Jacoby has that Justice Moskowitz never

has had and never will have the political courage to disqualify Mr. Jacoby and his law firm as attorneys for the defendants, even though my motion raised that issue has been pending and unresolved for many months, and even though the necessity for such disqualification of Mr. Jacoby and his firm is made even more apparent by their status as defendants in the Federal Action.

61. The existence of a double standard is shown by the fact that although Justice Moskowitz condemned me for the instantaneous decision to read the materials that had been placed before me, and stated that I must "suffer the consequences" of supposedly "heinous" conduct (Tr. 1/9/92, pp. 9-10), it took Justice Moskowitz herself many months to reach her decision.

62. I am informed that my lawyers have discussed this with numerous other attorneys, none of which understand what is so "heinous" about a person's decision to read false, adverse statements about that person glaring up at the same person in documents found on a conference table at a location where that person customarily sat and that, indeed, it would be considered to be imprudent for a paralegal not to do so as a preliminary to discussing the matter with a qualified lawyer.

63. The use of "heinous" by Justice Moskowitz to characterize my conduct in such an unusual and confusing situation is the trout in the milk indicative of extreme bias and prejudice.

64. The further statement of Justice Moskowitz that my action was so "egregious" because "the material was clearly the attorney's work product, clearly interviews with defendant's employees, clearly not for perusal by any other attorney or litigant [was] so heinous .... (Tr. 1/9/92, pp. 8-9, emphasis added) is further evidence of bias and prejudice.

65. Contrary to the invective used by Justice Moskowitz, there was nothing at all "clear" to me in the situation presented.

66. Justice Moskowitz said the materials on the table in front of me were "clearly the attorney's work product ...." (Id.)

67. To the best of my recollection, I had never even heard the phrase "work-product" used before the incident occurred, at least in the specialized sense used by Justice Moskowitz and the attorneys.

68. Justice Moskowitz does not explain how I was to know, instantaneously, that the papers were "clearly" of that specialized "work product" category, a category involving characteristics that, I am informed, it has taken scores of cases to define, none of which I had ever read.

69. In the absence of bias or prejudice in favor of the Red Cross or its politically potent law firm, what Justice Moskowitz should have said was that "clearly" I had a need to obtain the advice of an accredited lawyer; that "clearly" I would need to both read and retain the documents in order to obtain such advice; and that obtaining legal advice on such an issue, rather than being "heinous," on the contrary rises to the level of constitutional due process rights when the continuing pendency of my complaint for sexual harassment is in issue.

70. Justice Moskowitz stated that the documents were "clearly" not for perusal by any other attorney or litigant in this litigation," but her terminology shows bias and prejudice because "clearly" I did not (and still do not) know whether such documents deliberately deposited where they were, unsealed, open, and without any mark of confidentiality, were or were not to be considered available for any "other

attorney" or litigant in this litigation, and believe on the contrary that they were deliberately planted there to intimidate me.

71. I therefore was entitled to obtain the advice of counsel, the exercise of a right which required that I retain custody of the documents for that purpose, and also to see whether any claim was made by Mr. Baer that he had left papers there by mistake.

72. The fact that Mr. Baer never made any such claim is further evidence that his action, with respect to papers that he had no occasion to have with him on that day, was deliberate.

73. Bias and prejudice on the part of the judge is further shown in her statement criticizing me for taking the papers with me for the purpose of obtaining legal advice, while at the same time admitting that even she, a person who is experienced in the law, felt that she herself would need to look at the papers, as "something I should do," in order to form an opinion on the matter. (Tr. 1/9/92, p. 8.) In other words, an act apparently became "heinous" when applied to me, even though I, a mere novice never having attended law school, reached the same conclusion that Justice Moskowitz did, namely, that in order to act properly on so complex a matter, I would need not only to read the documents, but also to show them to my attorney.

74. From my perspective, the ultimate in bias and prejudice is shown by the statement of Justice Moskowitz, after looking at the papers, that "I don't even see anything in these papers in relation to this lawsuit." (Tr. 1/9/92, p. 8.)

75. Although not a lawyer, I do know the facts of my lawsuit, as apparently Justice Moskowitz does not, and I do know that the contents of the documents directly relate to my lawsuit.

76. I therefore am able to say with confidence that the contents of the documents "clearly" relate to the facts of my lawsuit; that the statement of Judge Moskowitz is "clearly" false; that she is "clearly" attempting to suppress those facts that are directly relevant to my claim of sexual harassment; that she "clearly" does not understand the significance of the orchestrated acts under the continuing direction of the "litigation strategies" experts of a law firm such as Weil, Gotshal & Manges to retaliate against and professionally destroy a woman who makes a claim of sexual harassment against one of their "c.e.o." - type politically potent male clients; and that "clearly" Justice Moskowitz is attempting to deprive me of my constitutional right to a jury trial. I seek such a trial with regard to the very same issue that Justice Moskowitz referred to in her decision, namely the relationship of what is shown in those papers to my claim of sexual harassment and conspiracy to retaliate against me for having made such a claim, as alleged in paragraphs 63-67 of my complaint.

77. Bias and prejudice of Justice Moskowitz also is shown by her punitive intimidation of my counsel and her effective deprival of and interference with my counsel when he attempted to explain to her the relationship between what she admitted she didn't understand (id.), namely the relationship between what was in the papers and my lawsuit.

78. Finally, bias and prejudice by Justice Moskowitz is shown by her evident unpreparedness when she rendered her decision on January 9, 1992.

79. Despite the importance of the matter, the extended period of time the matter had been before her, and the Draconian nature of what she did on January 9, 1992, Justice Moskowitz had not prepared a written decision in advance.

80. In what appeared to be a last-minute effort (perhaps to comply with applicable time limitations), Justice Moskowitz rendered her decision orally from a bench cluttered with books and papers in an obvious state of disarray, with extended pauses in a distraught effort to search through and read what was before her.

81. The hurried, cursory and incomplete nature of the decision is apparent.

82. Justice Moskowitz failed even to address the complex issue of waiver of any claim of privilege that had been presented because of the inadequacy of the precautions taken by Weil, Gotshal & Manges.

83. Justice Moskowitz also failed to address or make findings on the fact issues of whether the documents had been deliberately placed in front of me to intimidate me or entrap me, or the separate factual questions of whether the claim of privilege was not available because of the tortious and unlawful nature of the factual information contained in the documents.

84. In addition, as discussed above, the Cross-Motion to disqualify Weil, Gotshal & Manges from continuing to represent defendants in this litigation because of unethical conduct, was completely ignored by Justice Moskowitz despite the fact that it should have had her first attention.

E. The Political Nexus for Disqualification

85. The nexus between the political clout of the Red Cross and my case is very clear.

86. Andrew Cuomo, son of the Governor and also Founder and President of Housing Enterprise for the Less Privileged, Inc., approached The American Red Cross in Greater New York, the "only not-for profit organization" which had been approached about support to join in partnership with his not-for-profit homeless empire, in 1986 to form

> "HELP I [Homeless Emergency Leveraging Partnership], a public/private sector partnership formed as a not-for-profit corporation ...." (Exhibit A, The American Red Cross in Greater New York Minutes of the Executive Board, January 14, 1987 & April 1, 1987, annexed hereto.)

87. Jesse D. Wolff of Weil, Gotshal & Manges is shown by Exhibit A to have been directly involved.

88. According to a news item in The New York Times, Feb. 20, 1986, Section A; Page 1):

> "Under the plan, the state will use its condemnation powers to take over the site in the East New York section, and a private developer will build the shelter at no profit, with the Red Cross operating it under contract to the new corporation."
>
> "The U.D.C. [Urban Development Corporation] is to transfer the land to HELP I. The City would contract with the organization, which in

turn, would hire the Red Cross to manage the shelters."

89. Through HELP I, the American Red Cross in Greater New York participated in the development and operation of a comprehensive program of family services in New York involving huge amounts of money.

90. According to an news item in Newsday, June 11, 1991, Part II; p. 49, Andrew Cuomo "plotted and planned" with the Red Cross to build eight HELP projects in New York City, Suffolk County, Westchester County and Albany.

91. The Newsday article states that HELP has an annual operating income of about $30 million derived from federal, state and local funds.

92. An October 9, 1989, Newsday, Section News: p. 22, news item quotes Bender c.e.o. of the Red Cross as stating

> "The bulk of the funding of these programs comes from the federal, state and local governments. Private foundations and individuals also contribute support."

93. The October 9, 1989, Newsday article also quotes Melvin Reeves, Director of HELP I as stating

> "We're [The Red Cross] landlords...."

94. Financing for some of the shelters is through bonds issued by the state's Housing Finance Corporation which are to be paid back through welfare checks of the residents.

95. In the Newsday, June 11, 1991 news item,

Andrew Cuomo is referred to as threatening the use of political reprisals to destroy careers through access to his father's power and friendly journalists:

> "A few politicians who've dared to get in HELP's way say he [Cuomo] responded with a scorched-earth assault, threatening to use his access to his father's power and friendly journalists to destroy their careers." (Emphasis added.)
>
> * * * * *
>
> "When Suffolk Housing Services,a not-for-profit advocacy group for integration dared to oppose siting a HELP shelter in the impoverished minority community of North Bellport, Cuomo responded with indignation.'Who elected them?' he wanted to know."
>
> * * * * *
>
> "John DeMarco, a former Westchester County legislator, is among those with the misfortune to get in Cuomo's way."
>
> * * * * *
>
> "Later, when Cuomo talked about 'ordering' Democratic legislators how to vote, Demarco says, he decided to vote against HELP."
>
> * * * * *
>
> "The project went through anyway, after another county legislator, Paul Feiner, told colleagues and a reporter that Cuomo invoked his father's name and threatened to 'ruin' him."

96. As a Trustee of the Red Cross, and Member of the Audit Committee of the Board of Trustees, Jesse D. Wolff, a Red Cross lawyer, is very much involved with Andrew Cuomo and the Red Cross Audit Committee in its handling of huge amounts of money at its disposal owed to the American Red Cross in Greater New York by the City of New York.

97. Jesse D. Wolff is a senior lawyer with Weil, Gotshal & Manges, attorneys for the Red Cross and defendant Bender, its Chief Executive Officer.

98. Thus, Weil, Gotshal & Manges had an open and continuing line of communication with Andrew Cuomo during the pendency of this litigation.

99. Andrew Cuomo is not only the son of the Governor but also has independent standing as an important figure in Democratic Party politics in New York State in his own right.

100. During 1991, when the Red Cross and Weil, Gotshal & Manges were attempting to have my case squelched, as a means of suppressing information directly linking defendant Bender and Weil, Gotshal & Manges with repeated obstruction of justice, Karla Moskowitz, then a Civil Court Judge with only "Acting" status in the Supreme Court, was desirous of obtaining official Democratic Party designation as a Supreme Court Justice from the Democratic Party Screening Panel. See New York Law Journal, August 20, 1990, p. 1.

101. As shown in the New York Law Journal of August 20, 1990, p. 1, Karla Moskowitz was one of nine Civil Court Judges being considered for only three such positions that were available.

102. Approval of influential persons in Democratic politics such as Mr. Andrew Cuomo, is obviously an important factor taken into account in deciding which Judges to elevate.

103. During the period that Karla Moskowitz was a candidate for elevation to the Supreme Court, the application of the Red Cross to strike my complaint was pending before her.

104. Justice Moskowitz was elevated to the Supreme Court after her election in November 1991.

105. Just a short time later, on January 9, 1992, Karla Moskowitz hurriedly, and obviously with only minimal preparation, announced her decision to dismiss the complaint in my case, and to suppress from public scrutiny my allegations involving sexual harassment by defendant Bender.

106. Justice Moskowitz took this action on the basis of an absolutely false statement, namely that there was nothing in the papers that I saw, and that she suppressed, "in relation to this lawsuit." (Tr. 1/9/92, p.8.)

107. The bias of Justice Moskowitz is not because I am a woman, for she is a woman, nor do I believe it is because she is generally adverse to civil rights.

108. Her bias and prejudice is not against civil rights generally; on the contrary, the bias and prejudice is against the enforcement of my civil rights, as an outgrowth of intimidation or reprisals by the entrenched political power of defendants and their counsel.

109. At the critical time, when my case was before her, Judge Moskowitz clearly was desirous of designation by the Democratic Party for elevation to the post of Supreme Court Justice.

110. The closeness of Justice Moskowitz's approval by the Democratic Party is indicated by the New York Law Journal of September 25, 1991.

111. While at the same time Justice Moskowitz incorrectly stated that "I don't even see anything in these papers in relation to this lawsuit" (Tr. 1/9/92, p. 8), she suppressed the very papers that would make it possible for my lawyers to demonstrate the falsity of such utterance.

112. Justice Moskowitz has shown complete and ultimate bias and prejudice in purporting not even to understand the extreme mental anguish and emotional distress inflicted upon me by the false contents of those papers.

113. Bias is also shown by the failure of Justice Moskowitz to recognize that a jury issue was raised by the issue of whether a reasonable person in my situation would read the contents of the papers about her that had been placed before her in such circumstances.

114. Coming from a Judge who has the allegations of paragraphs 17 and 63-67 of my complaint repeatedly brought to her attention in discovery disputes, the statement of Justice Moskowitz that "I don't even see anything in these papers in relation to this lawsuit" (Tr. 1/9/92, p.8), such a false statement can only be attributed to personal bias or prejudice.

115. Paragraphs 17 and 63-67 of the complaint state:

> "17. Defendants engaged in sexual discrimination against women executives throughout the organization, and permitted the male employees, including defendant Bender and his predecessor as Manager, Robert Shea, to treat female employees, including plaintiff, as

playthings who were fair objects of sexual harassment, favors, and sexual stereotyping. Further, throughout plaintiff's period of employment, defendant Bender repeatedly sought to coerce her into taking improper discriminatory action against other female employees despite the fact that the actions requested were not within plaintiff's job responsibilities, in addition to being unlawful."

* * * * *

"63. On information and belief, defendant Bender made the same defamatory statements and has engaged in a conspiracy to abuse plaintiff and wreck her career by interference with her prospective employers by publishing and repeating to others the defamatory statements alleged above."

"64. Said slanderous statements were false and were known by defendant Bender to be false and were made with actual malice to plaintiff with willful intent to injure plaintiff and with the knowledge that they would be spread through the grapevine in the health care industry and repeated to others from whom plaintiff sought employment, causing irreparable injury to the reputation of plaintiff that can never be redressed. Defendant Bender conspired with Rothschild, Wood and other co-conspirators to publish and repeat said statements to others with the deliberate intent of ruining plaintiff's reputation and destroying her career."

"65. But for the dissemination and publication of said statements, plaintiff would have obtained satisfactory employment and at a higher rate of compensation than she had at Red Cross based on her qualifications and experience."

"66. Said activities of defendants have made it impossible for plaintiff to resume her career and profession."

"67. Said defamatory statements and acts of defendants (a) were vindictive, wanton and malicious, and made with express malice or in reckless or grossly negligent disregard of the rights of plaintiff, (b) were for the unlawful purpose of deterring others from seeking redress for such violations of their rights and (c) were in furtherance of the conspiracy to conceal and suppress disclosure of the pattern or practice of sexual discrimination and abuse within the Red Cross. Shortly after plaintiff's termination, in fact, defendant Bender caused a personnel "workshop" to be held in the Red Cross for the specific purpose of intimidating and coercing employees not to file complaints or sue because of such discriminatory and abusive employment practices."

116. The intensity of my anguish upon seeing the statements in the documents was made clear at the hearing on July 8, 1991, when I stated (Tr. 7/8/91, p. 102)

"I almost collapsed a week ago Saturday. And I am warning you, [Mr. Jacoby], you better be careful with me."

117. The tenets of justice from the time immemorial were violated by Justice Moskowitz.

118. Justice requires the delivery of my soul from the sword; from the power of the dog, from the lion's mouth. (Psalm 22, v. 20-21.)

119. Yet Justice Moskowitz failed to hear my anguished plea, she failed to understand that no human being could reasonably be expected not to read such false statements made about herself when they had been placed in front of her.

120. Justice Moskowitz has despised or abhorred the plea of the afflicted; she has hid her face from me; she has not heard when I cried unto her, but has paid attention only to the evildoers who encircle me. Justice Moskowitz concluded that I was not entitled to justice because of the false and scandalous things about me that she read in the papers that the evildoers placed before me.

121. Judge Moskowitz's compliance with the request of the same evildoers to sign the Order to Show Cause dated July 10, 1992, creates a condition of extreme peril for me, for they seek only to silence my plea for justice and are addressed to the same judge (a) who did not consider my plea to strike their answers because of persistent and continuing discovery abuse of the most heinous kind; (b) who did not rule upon my motion to disqualify the counsel for politically potent defendants; and (c) who did not address paramount public policies embodied in my claims of sexual harassment and constitutional rights.

122. Instead, as a convenient and obviously politically rewarding means of avoiding addressing such issues, the judge made false statements about the contents of the documents and about my situation, and dismissed my case, in the evident

expectation that I would silently depart.

123. But I am child of victims of the Holocaust, on both sides of my family. I do not intend to be intimidated or silenced about what has happened to me, or to meekly disappear with my claim for sexual harassment to the legal equivalent of Auschwitz, the obvious purpose of the Order to Show Cause that Justice Moskowitz signed.

124. Fidelity to my heritage compels me to request that the judge be recused or disqualified, and that a jury determine the disputed fact issues including (a) how the papers came to be placed in front of me, whether for deliberate entrapment, or to intimidate, or as a result of gross negligence by defendants' counsel, and (b) whether a reasonable person in such circumstances would have read them and sought advice concerning the legal significance of what their contents disclosed.

125. In addition, I request as well that my rights to due process, equal protection of law, and my privileges and immunities as a Citizen of the United States, including the right of access to a Federal Court system, free from the pervasive influence of New York City Democratic Party politics, be respected and honored.

WHEREFORE, Justice Moskowitz should recuse herself or be disqualified from further participation herein.

/s/

Joan Carol Lipin

Sworn to before me on
July 21st, 1992:

/s/

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

- against -

ROBERT M. BENDER, JR., THE AMERICAN NATIONAL RED CROSS and AMERICAN RED CROSS IN GREATER NEW YORK,

Defendants.

INDEX NO. 15653/89

JUSTICE KARLA MOSKOWITZ

AFFIDAVIT OF JOAN CAROL LIPIN IN SUPPORT OF PLAINTIFF'S RENEWED MOTION TO RECUSE AND DISQUALIFY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

1. I am the plaintiff in the above action and respectfully submit this affidavit in support of my renewed motion to recuse or disqualify Hon. Karla Moskowitz, J.S.C., from further participation in this litigation.

EXHIBIT G

2. The urgent necessity of such action is shown by the intemperate and biased behavior of Justice Moskowitz at the hearing herein on July 23, 1992. A true copy of the transcript of said hearing is annexed as Exhibit A.

3. Such behavior is part of a continuing pattern or practice of prejudicial and biased conduct on the part of Justice Moskowitz in my case as shown in my prior affidavit dated July 21, 1992, which is incorporated by reference herein.

4. At the hearing of my Cross-Motion for recusal or disqualification on July 23, 1992, a serious matter to which my attorney and I had devoted substantial amount of time, further acts attributable to bias and prejudice on the part of Justice Moskowitz were shown starkly and vividly.

5. At the hearing Justice Moskowitz peremptorily and without any serious consideration denied the motion, although she stated that she had not seen the papers previously (Tr. 3, 5-6, 8)

6. Justice Moskowitz merely scanned my affidavit of 31 pages, plus substantial attachments totaling 36 pages, for no longer than only approximately two to three minutes, to my direct observation, before ruling.

7. Moreover, Justice Moskowitz did not consider at all, or even discuss, the legal authorities in our Memorandum of Law in support of the Cross-Motion to recuse and disqualify, as it was clear that she did not pick up the document or read it.

8. Further, at the hearing on July 23, 1992, Justice Moskowitz demonstrated her predisposition to accept arguments brazenly put forward by Weil, Gotshal & Manges without consideration, reflection, study of the authorities, or without even the citation of any authority (Tr. 11-13), and to make snap

judgments in favor of that firm's clients. (Tr. 8, 11.)

9. Justice Moskowitz declined even to hear argument from my attorney, obviously because she had already made up her mind in advance to go along with whatever the Juggernaut from Weil, Gotshal & Manges might choose to say, notwithstanding that law firm's clear and continuing disqualification due to conflict of interest to represent defendants in this case, and also due to the status of attorneys in that firm as necessary witnesses, a disqualification that Justice Moskowitz manifestly lacks the courage to address despite the fact that the issue has been squarely raised before her.

10. Despite the seriousness of my motion to recuse and disqualify, Justice Moskowitz said to my attorney

> "... I am not going to listen to your argument."
> (Tr. p. 8)

and summarily rejected the Cross-Motion, even though no papers in opposition had been received from defendants.

11. Although Justice Moskowitz stated

> "The Court: Well, I'll read them in a minute"
> (Tr. 6), and

> "The Court:... I'm quickly reading the papers."
> (Tr. 8),

it was clear to me that Judge Moskowitz, who was in my full view throughout, in fact did not read or study the papers, or give them any kind of serious consideration whatsoever.

12. At most, she merely thumbed through them, with the total elapsed time not exceeding about three minutes, and did not examine the legal authorities discussed in the Memorandum of Law at all.

13. The Chief Administrator of the Courts promulgated the provisions in Part 100 relating to disqualification as a serious matter, not something merely to be given lip service to by a judge who evidently is already highly prejudiced.

14. The object of the disqualification rules of the Chief Administrator is to ensure that a judge conducts herself at all times (22 NYCRR § 100.2(a))

> "... in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

15. At the time of the hearing on July 23, 1992, present in the courtroom were a number of other attorneys awaiting argument on their motions.

16. The manner of the handling of the motion to recuse and disqualify by Justice Moskowitz would do anything but promote public confidence in the integrity and impartiality of the judiciary.

17. On the contrary, the flippant demeanor of Justice Moskowitz at the time, in full view of other members of the Bar, was that of a judge making a snap judgment on a highly important matter without (a) having previously read the papers, (b) given the matter any serious consideration whatsoever, and (c) after having precluded argument on the subject (Tr. 8, 11-13.)

18. Further, there is no way that Justice Moskowitz can make a decision on contempt issues raised in the Order to Show Cause dated July 10, 1992 which she signed in this matter without giving consideration to disputed evidentiary facts on the basis of personal knowledge.

19. These disputed evidentiary facts are found in the documents that Justice Moskowitz examined on an in camera basis a year ago.

20. Those documents were rejected by Justice Moskowitz from the record before the Court.

21. Yet those documents directly relate to my claim that my constitutional rights were violated as a result of the unlawful conspiracy among the defendants, contrary to 42 U.S.C. §§ 1985 and 1986.

22. In the affidavit of Mark A. Jacoby dated July 10, 1992, it is stated that the Complaint in the Federal Action is going to be supplied to Justice Moskowitz on an in camera basis to review in connection with contempt and other drastic action which defendants seek against me and my attorneys. (Jacoby Aff. 7/10/92, ¶ 3.)

23. In this situation the prejudice to me will be even greater because Justice Moskowitz will be using her personal recollection of the contents of the documents that are not in the record to evaluate against a Federal Complaint that itself is not in the record, and is being submitted to the Court by Weil, Gotshal & Manges in violation of the Order of Judge Sand sealing of the complaint which Weil, Gotshal & Manges, acting with a conflict of interest obtained on behalf of both themselves (Messrs. Jacoby, Baer and Wolff are named defendants) and the defendants herein.

24. Weil, Gotshal & Manges clearly regard themselves free to aid and abet Justice Moskowitz in violating the Order that they themselves obtained from Judge Sand, but can be expected to follow their past practice of denying effective representation of counsel to me by seeking punitive action against my attorneys if they seek to advance arguments based upon what is stated in the sealed documents.

25. To conclude, the willingness of Justice Moskowitz to accept, hook, line, and sinker, virtually anything that Weil, Gotshal & Manges says on behalf of defendants, and to refuse to read, consider or even listen to what is shown on my behalf, is again demonstrated by the transcript of July 23, 1992, creates a situation that exposes me and my counsel to great prejudice in this proceeding, and it should be permitted to go no further without the recusal and disqualification of Justice Moskowitz from any further participation.

WHEREFORE, Justice Moskowitz should recuse herself or be disqualified for further participation herein.

/s/

Joan Carol Lipin

Sworn to before me this

29th day of July, 1992:

/s/

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOAN CAROL LIPIN,	INDEX NO. 15653/89
Plaintiff,	JUSTICE KARLA MOSKOWITZ
- against -	AFFIRMATION OF ARTHUR M. WISEHART
ROBERT M. BENDER, JR., THE AMERICAN NATIONAL RED CROSS and AMERICAN RED CROSS IN GREATER NEW YORK,	
Defendants.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ARTHUR M. WISEHART, an attorney duly admitted to practice law before the Courts of the State of New York, and the attorney of record for plaintiff herein, hereby affirms the following statements under penalty of perjury:

1. I am the attorney for the plaintiff, Joan Carol Lipin, in this action.

EXHIBIT I

2. This affirmation is respectfully submitted in opposition to the contentions made by defendants with regard to the prior proceedings herein, a matter about which I have personal knowledge.

3. Defendants' Supplemental Memorandum of Law dated July 30, 1992, contends that issues raised by plaintiff were "in reality, an untimely and unwarranted attempt to re-argue this Court's January 9, 1992 Order." (Mem. p. 5, fn. 2.)

4. On the contrary, defendants themselves seek to re-argue but to revise the Court's Order of January 9, 1992, and also seek its revision as well.

5. At the time the Order was issued, I was present, as was Lawrence J. Baer of Weil, Gotshal & Manges and Barbara M. Cummins of Morgan, Lewis & Bockius, attorneys for defendants, as shown in Exhibit A annexed to the Order to Show Cause dated July 10, 1992.

6. The statements found in the transcript of the hearing, Justice Moskowitz wrote out her Order and signed it, as shown on the first page of Exhibit A annexed to the Order to Show Cause.

7. After she had done so, she showed said Order to Mr. Baer and Ms. Cummins, and asked if he had any comments.

8. Mr. Baer and Ms. Cummins had no comments and requested no revisions in that Order.

9. Mr. Baer and Ms. Cummins therefore were well aware of the precise language used by Justice Moskowitz in issuing her Order of January 9, 1992, and consented to its terms.

10. The attempt by defendants now to seek revisions in those terms is inconsistent with the prior approval of those terms by counsel for defendants, and they are estopped from now instituting further proceedings for the purpose of seeking such changes.

11. At the same time, Justice Moskowitz also wrote out and signed a further Order, a true copy of which is annexed hereto as Exhibit A.

12. The handwritten form of Exhibit A annexed hereto also demonstrates, in fact, that counsel for the parties present on January 9, 1992 actively participated in the wording used by the Court in the Orders the Court signed on that date, as portions of the handwriting on that document are inserts made by the undersigned and by Mr. Baer after Justice Moskowitz showed it to counsel, along with the other Order, for their review.

13. The terms of that additional Order of the same date clearly contemplate that plaintiff and her counsel would be permitted to make use of and refer to the documents found by plaintiff for the purpose of prosecuting an appeal to the Appellate Division.

14. This is also shown by the Court's statement in the transcript of January 9, 1992 that said documents were to be held available for use in a possible appeal. (Tr. 1/9/92, p. 10.)

15. Reference to such documents in the course of an appeal is no different in substance than referring to them in a separate Federal Action which plaintiff has been forced to bring in order to protect her rights.

16. It therefore is obvious that similar references to the documents for the purpose of prosecuting a separate Federal

Action in order to protect the rights of the plaintiff, if she should be so advised, in view of the dismissal by this Court of plaintiff's action, is fully consistent with this Court's decision of January 9, 1992, not violative of it.

17. Further, in Exhibit B annexed hereto, Mr. Baer's letter of January 22, 1992, confirms that counsel for defendants recognize that references could be made to the documents in the process of prosecuting an appeal by plaintiff.

18. Mr. Baer's letter said that he would be willing to agree that plaintiff could make reference "in papers filed with the Court in the future to the information contained in the documents" if such references were made "in a general manner ...." (Emphasis added.)

19. The falsity of the information provided to the Court by defendants concerning the documents and how plaintiff came into possession of them, is demonstrated by Mr. Baer's letter of January 24, 1992, a copy of which is annexed hereto as Exhibit C.

20. The Baer letter belatedly admits that the documents in question were found by plaintiff, as she contended all along, in front of her at the conference table during the oral argument before Special Referee Birnbaum on June 28, 1991.

21. This admission is a marked contrast to Mr. Baer's affidavit of July 3, 1991, which was used by defendants as a basis for their defamatory contention that plaintiff supposedly stole the documents.

22. On the contrary, the documents, as plaintiff has repeatedly said, were delivered to her or in her possession by defendants for the purpose of derailing this litigation or intimidating her, or through the gross negligence of Mr. Baer

himself.

23. The falsity of the Baer affidavit of July 3, 1991, a copy of which is annexed hereto as Exhibit D, thus is established by the Baer letter of January 24, 1992, which was received after this Court's decision. Notwithstanding its significance counsel for defendants took no steps whatsoever to withdraw the Baer affidavit of July 3, 1991, or advise the Court of its falsity.

24. In view of such circumstances, involving the deliberate deceit of the Court by attorneys from Weil, Gotshal & Manges, plaintiff was fully justified in commencing a separate Federal Action in which Mr. Baer himself, along with Messrs. Jaocby and Wolff of Weil, Gotshal & Manges are named as defendants, for the purpose of asserting a claim against them for treble damages pursuant to Section 487 of the New York Judiciary Law, as found pleaded in Count II of the Federal Complaint at paragraphs 176-202.

25. The importance of plaintiff's of obtaining a remedy against Weil, Gotshal & Manges is further shown by the Baer letter in that it deals with the threats that Baer has repeatedly made to lawyers in this firm, threatening to put this firm out of business if we continued to seek to enforce plaintiff's rights.

26. The threats of Mr. Baer were made not only to the undersigned but to other attorneys to this firm as well, as is shown in the affidavit of Michael H. Prince dated August 4, 1992, annexed hereto as Exhibit E.

27. The admissions in the Baer letter of January 24, 1992, establish without a doubt that Mr. Baer is a necessary witness in any further proceedings either here or in the Federal Action.

28. Hence there can be no question that the law firm of Weil, Gotshal & Manges must be disqualified forthwith from any further involvement in this case as attorneys for the Red Cross, pursuant to the Disciplinary Rules 5-101 and 5-102 of the Code of Professional Responsibility as applicable in New York State.

29. Defendants Supplemental Memorandum of July 30, 1992, falsely contends that this firm has admitted that the Complaint int he federal Action "uses and incorporates the privileged information which was the subject of this Court's Order."

30. That is not the case at all.

31. Only general references to the documents are made, and to a very limited extent as necessary to preserve the legal rights of plaintiff.

32. As shown in the transcripts of the hearings before this Court on July 8 & 11, 1991, a copy of which is annexed hereto as Exhibit F, such references in the Complaint in the Federal Action do not go beyond information that is already found in the public record in any event.

33. Therefore no violation of this Court's Order of January 9, 1992, has occurred.

34. References to the documents in the Complaint in the Federal Action are fully consistent with what had already been revealed on the public record by counsel for the defendants themselves at the time the Court dismissed its Order. Otherwise, the transcripts of the hearings of July 8 & 11, 1991, would have also been suppressed and sealed, but counsel for defendants have never made any such request, nor could they now do so.

35. Defendants have conceded in their Supplemental Memorandum dated July 30, 1992, that "defendants have not sought an injunction from this Court against prosecution of the Federal Action." (p. 12.)

36. Accordingly, no jurisdictional basis exists for this proceeding as the complaint has been dismissed in its entirety, and the entry of final judgment has previously been directed by the Court in its Order of January 9, 1992.

WHEREFORE, defendants' Order to Show Cause dated July 10, 1992, should be dismissed.

Dated: New York, New York
August 4, 1992

Respectfully submitted,

/s/

Arthur M. Wisehart
Attorney for Plaintiff

WISEHART & KOCH
25 West 43rd Street
Suite 1114
New York, New York 10036
(212) 730-0044

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

- against -

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, and JESSE D. WOLFF

Defendants.

92 Civ. 4455 (LBS)

REPLY AFFIDAVIT OF JOAN CAROL LIPIN IN SUPPORT OF PLAINTIFF'S MOTION TO VACATE STAY AND OTHER RELIEF

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

1. The pattern of deception initiated by the affidavits of Messrs. Baer and Jacoby dated July 3, 1991, is perpetuated in Mr. Baer's present affidavit sworn to October 23, 1992.

2. The continuation of such a pattern of deception is shown markedly by the juxtaposition of paragraphs 20 and 21 of Mr. Baer's affidavit.

3. Paragraph 20 contains the piously self-serving statement, "At no time did I ever deceive the State Court or any Court concerning the events of June 28, 1991."

4. In paragraph 21, Mr. Baer goes on to state, again on the basis of "personal knowledge," that his affidavit of July 3, 1991 in view of plaintiff's testimony of July 8, 1991, "was rendered superfluous."

5. However no indication was ever given by Mr. Baer or by Weil, Gotshal & Manges to or by the court that his affidavit, which was submitted to this Court by Mr. Jacoby as Exhibit C to his affidavit of July 7, 1992, had ever been regarded as having been rendered "superfluous." On the contrary, Mr. Jacoby's affidavit clearly considered the Baer affidavit of July 3, 1991 to be anything but "superfluous" and submitted it together with his affidavit of the same date as Exhibit C, and plainly identified it among the affidavits "filed in support of" the Order to Show Cause requested and in fact granted, on that date, on the basis of the self-same affidavits. (Emphasis added.)

6. Moreover, as Mr. Baer now implicitly concedes, his affidavit of July 3, 1991, was definitely false in his account of what happened, even though it was submitted to the State Court only a few days after the actual occurrence.

7. Paragraph 21 of Mr. Baer's affidavit also incorrectly states that, following my testimony, "There simply was nothing further that needed to be said on the subject."

8. On the contrary, there is a great deal more that needs to be said on the subject. Among the things that need to be said on the subject, that have never been said, are why Mr. Baer had the documents with him on June 28, 1991, since they had nothing to do with the proceedings in court that day; or

why he placed them on the table in the conference room of Special Referee Birnbaum at the place where I customarily sat, totally separated and apart both from him and any of his other papers that he was using in connection with the proceeding; or how was it possible for him to place those papers deliberately in that unusual location; without being aware that he in fact had done so, which is what he is implicitly claiming or why he chose papers that would viciously defame me to place at that location if it was not for the purpose of capturing my attention and entrapping me; or why he supposedly never discovered that he no longer had the papers; or why his litigation assistant, Hope Kerstman was with him on that date for the purpose of managing documents and said nothing to him; or what he told his partner Mr. Jacoby or his clients with regard to what had been done with the documents, or how he can contend that Justice Moskowitz was not deceived and that she relied totally upon my testimony when in fact, after having heard my testimony she said explicitly that she made the finding that I had not stolen any documents and that defendants would have to call their own witness (which in fact they never did), (Lipin Aff. 10/6/92, Exhibit Q, TR 7/11/91 pp. 146-7):

> "The Court[Justice Moskowitz]: Counselor, if I were the plaintiff -- her testimony isn't that she stole papers, but that she sat down and the papers were in front of her, right?"
>
> "Mr. Jacoby: Your Honor, these were papers on a counsel [conference] table. She didn't put them there. Not her lawyer. The lawyer on the other side."
>
> "Now, I don't believe for one minute that this pile of papers was sitting directly in front of her in a neat pile facing her four inches off the table."

"The Court[Justice Moskowitz]: That is the testimony."

"Mr. Jacoby: I understand that."

"The Court[Justice Moskowitz]: You didn't bring anybody in to say that the papers were scattered, or the papers were on the other side of the table, or the papers were at the foot of the table, or the papers were in any other location. If I choose to believe the plaintiff then her testimony, and I was just looking for it, is that she sat down before argument started and when she sat down, right in front of her, four inches from the edge of the table, was a neat stack of papers." (Emphasis added.)

9. Not only did Justice Moskowitz make the above statement after hearing my testimony on July 8, 1991, on July 11, 1991, when Mr. Jacoby declined to call a witness on his own, Justice Moskowitz indicated that she was sufficiently satisfied with my explanation that she wanted discovery to move forward in the form and production of documents by the Red Cross of a scheduled E.B.T. (Id., TR 7/11/91, pp. 139-140.)

10. Thus if influence from political factors involved in her oncoming election for elevation as a full Supreme Court Justice are put to one side, the only thing that can account for the drastic change in attitude by Justice Moskowitz between July 11, 1991, and her decision of January 9, 1992, is that she read the false affidavit of Mr. Baer and the false affidavit of Mr. Jacoby, who falsely stated that his affidavit was made on the basis of "personal knowledge," attempted to corroborate the false statements about what occurred in the Baer affidavit.

11. Paragraph 23 of the Baer affidavit continues the same pattern of intentional deception. He says that "I reaffirm my prior affidavit testimony [this is the affidavit that was not testimony, but was in an earlier paragraph was referred to by Mr. Baer as having been rendered "superfluous"] "that at no time did I ever voluntarily or knowingly show or give to plaintiff or plaintiff's counsel the Privileged/Work Product Documents."

12. The fact is that Mr. Baer did deliver those documents into my possession fully expecting me to be present on June 28, 1991 at Birnbaum's room and by placing them, prior to my arrival, at the place where it was foreseeable I would be seated at the conference before Special Referee Birnbaum on June 28, 1991. If he is contending that he did not do so voluntarily I am unable to understand that because he certainly placed the papers in that location voluntarily, (unless Mr. Jacoby ordered him to do so), as there was no indication that he had taken leave of his senses.

13. In paragraph 24 Mr. Baer falsely states that "at no time did I ever consent to plaintiff's or plaintiff's counsel examining or taking the Privileged/Work Product Documents."

14. On the contrary, that was the purpose and intent of Mr. Baer in placing the documents there because obviously, pursuant to a scheme that had been hatched out presumably with the concurrence of Mr. Jacoby, it was fully expected that I would find the documents, that I would not return them; and that the defendants thereupon after a month or two had gone by would "suddenly" discover that they were missing, and make inquiry, which would then enable them to contend, in their distorted view, that the copies of the documents had in fact been "stolen", knowing that by that time we probably would be unable to prove that the whole purpose and intent of defendants was entrapment based upon a stratagem in violation of

Disciplinary Rule 7-102(A)(1), that would forever remain hidden behind the smoke-screen of the claim of attorney-client privilege.

15. My disclosure and return of the copies of documents upon the second business day after I received them, was inconsistent with the scheme that the defendants had envisioned, but they nevertheless deemed it desirable to go forward with the pre-planned story, apparently in view of the risks of (a) professional liability exposure, or (b) other form of criticism by their multiple clients.

16. A further serious deception in Mr. Baer's latest affidavit is in the way in which he describes the application to the State Court three days after this Court granted the stay.

17. The application to the State Court involves a request for contempt and what Mr. Baer attempts to glide by as merely "other appropriate relief" merely with regard to "interpretation and enforcement" of the January 9, 1992 Order. (Baer Aff. ¶ 3.)

18. Only by reading the application for the Order to Show Cause can the linchpin of the true purpose of Messrs. Baer and Jacoby be ascertained. As shown in paragraph (d) of the Order to Show Cause signed ex parte by Justice Moskowitz, the most important aim and objective of Mr. Baer and Weil, Gotshal & Manges is to deprive me effectively of the representation by any counsel whatsoever in my attempt to bring to a hearing my claim of sexual harassment. It is simply outrageous that they should seek to do this when I am unable for over a year to obtain a ruling and determination on disqualification of their own counsel on very fundamental violations of the Disciplinary Rules of the Code of Professional Responsibility.

19. For the reasons stated in my prior affidavit at paragraphs 35-51, such activities by the defendants constitute severe and irreparable injury to me.

20. Nowhere in Mr. Baer's affidavit or in defendants' answering papers is the irreparable injury to me denied. As stated in No. 81 of the Federalist Papers by Alexander Hamilton, the decision as embodied in our Constitution to give to the federal courts concurrent jurisdiction with the state courts over certain matters is based upon a consideration that is squarely applicable here. Hamilton indicated the concern that state judges, subject to the need for re-election, "will be too little independent to be relied upon for an inflexible execution of the national laws." Rossiter, The Federalist Papers (New York: New American Library, 1961, p. 486.)

21. As I stated in my affidavit regarding the disqualification of Justice Moskowitz, I concluded that she had come under the political influence in view of her running for election at the same time that my case was pending, and making the decision in my case just a short time after reelection elevation to the position of Supreme Court Justice from the Civil Court, having been selected by the political party organization as among 3 out of 9 candidates for that purpose. (Lipin Aff. 10/6/92, Exhibit E Lipin Aff., July 21, 1992, ¶¶ 85-111.)

22. Alexander Hamilton correctly foresaw the risks of state judges who were subject to political influence, and the Constitution embodies my right to have a determination made in the Federal Court unhindered or interfered with by State Judges who are subject to political influence that can be readily generated by the Red Cross or its attorneys, especially in view of a very active involvement in a large joint venture between the New York Red Cross and an organization actively headed

by Andrew Cuomo.

23. What the defendants seek to do is to make it impossible for me to pursue my litigation in one way or another through the retaliatory action by the State Court. Such an attempt will be deprive me of my constitutional rights, and I ask that the stay that has previously been entered herein be vacated upon the showing of irreparable injury to which I have been subjected.

24. The effect of what was done was to provide a further opportunity to silence me to a state court judge who was not ethically qualified to do anything further in connection with the State Action, and who on the contrary would have every motive for wanting to prevent me from complaining further about the drastic and unsupported nature of my treatment at her hands on January 9, 1992.

25. The motive for suppressing is clear because it is the same judge who had utterly failed to do anything about the deliberate destruction of documents directly relevant to my case by Barbara Fletcher, the assistant and paramour of defendant Bender, the Chief Executive Officer of the New York Red Cross, who had aided and abetted her in permanently absconding from New York to California virtually on the eve of her scheduled deposition, to the knowledge and with the connivance of the same Lawrence J. Baer who has the outrageous effrontery to claim in his affidavit sworn to October 23, 1992 at paragraph 20 that he did not deceive the State Court. (Baer Aff. 10/23/92, ¶ 20.)

26. The Baer affidavit deceives further in stating that it is "based on personal knowledge" (¶ 2), whereas in fact the affidavit falsely states that I "participated in an unsolicited 'document production' of copies of the Privileged/Work Product documents as part of a shotgun settlement conference,"

(¶ 20), whereas in actual fact Mr. Baer, who also falsely claims "actual knowledge, was not present at the meeting on July 2, 1991, and neither was I.

27. The Baer affidavit also falsely claims that I "actually took the Privileged/Work Product documents from me [Baer] while they were on counsel's table ...." (¶ 19; emphasis added.)

28. I did not even know where Mr. Baer's papers or briefcase was to which I testified in cross-examination by Jacoby (Lipin Aff. 10/6/92, Exhibit L TR 7/8/91, p. 91):

> "Q. [By Jacoby] Do you know where Mr. Baer's briefcase was?"
>
> "A. No, I don't, Mr. Jacoby."
>
> "Q. [By Jacoby] Do you know where Mr. Baer's papers were?"
>
> "A. No, I don't Mr. Jacoby."

29. Justice Moskowitz found this to be significant evidence in support of my innocence and that the fact I am not guilty of what defendants falsely accuse me of when she stated on the record at page 91 on July 8, 1991 in response to my answers to Jacoby's cross-examination (TR 7/8/91, p. 91)

> "The Court [Justice Moskowitz] That is the answer." (Emphasis added.)

30. I never took the copies of the documents from Mr. Baer.

31. The documents were not in his possession, for reasons that he still declines to specify, as stated previously, the copies of the documents had been delivered prior to my arrival to the location I was expected to sit at the conference table in the room of Special Referee Birnbaum, diagonally across the way approximately six feet from Mr. Baer's location, where he in fact was located on that date with all of his other documents.

32. The Baer affidavit incorrectly refers to the table of the office of Mr. Birnbaum as "counsel table" (¶ 19), whereas it was a conference table used generally by those meeting with Special Referee Birnbaum.

33. Nor has Mr. Baer explained why the document he selected to be the top document of those that he placed in that location used a phrase that was so viciously false and insulting about me that I would be sure to see it and be overcome with horror, outrage and indignation.

34. Finally, Mr. Baer deceives the Court by stating that the Order to Show Cause in the State Action "is now scheduled to be heard before Justice Ciparick on November 18, 1992." (Baer Aff. ¶ 8.)

35. As Mr. Baer knows, but failed to disclose in his affidavit sworn to October 23, 1992, I filed a Notice of Appeal of the Order to Show Cause and the subsequent order of assignment by the disqualified Justice Moskowitz on October 21, 1992. (Notice of Appeal 10/21/92, annexed hereto as Exhibit A.)

36. As this Court is well aware, such appeal deprives Justice Ciparick of any jurisdiction.

37. Also undisclosed in the Baer affidavit is the fact that Justice Fingerhood by an order dated October 1, 1992 (Exhibit B, annexed hereto) referred the matter back to Justice Moskowitz.

38. If the Order of Justice Fingerhood were to be given effect, as a subsequent Order to the assignment order of Justice Moskowitz, the effect of the order of Justice Fingerhood is to lodge the Order to Show Cause with Justice Moskowitz, where it can not be acted upon, because of disqualification, and the state proceeding therefore is at a complete dead end.

39. Justice Fingerhood's Order of October 1, 1992 states:

> "Upon the foregoing papers it is ordered that this contempt motion is respectfully referred to Justice Moskowitz who issued the order and can interpret it."

40. Defendants memorandum, page 2, asserts that "Nothing has changed since July 7," except for defendants procurement of an ex parte Show Cause Order.

41. Such statement is completely incorrect;

(a) there have been two recusals by state court justices;

(b) there has been an admission by defendant Baer, repeated in defendants' brief, page 5-6, that his earlier affidavit of July 3, 1991, submitted with an equally false affidavit

> by defendant Jacoby of July 7, 1992, and July 3, 1991, contains willfully false statements, which he now has the effrontery to label as merely "superfluous," possibly in an effort to induce laughter, or tears with respect to how far defendants can abuse the justice system. (Baer Aff. 10/23/92.)

42. As stated, therefore, much has changed, and this stay which was procured on the basis of the submission knowingly incorrect statements by defendants' attorneys that are now acknowledged to be false should be vacated.

43. Defendants make further misstatements on page 2 of their memorandum, when they assert that certain documents were "misappropriated" and "purloined." While both words are also inaccurate as was the term "stolen" previously used, it does not thereby alleviate the wholly inaccurate characterization of what actually happened to the Disputed Documents.

44. The statement in the memorandum at page 5, and the Baer affidavit of October 23, 1992 at paragraph 19 represented Baer's "best effort" to reconstruct the circumstances. Such statement is utterly unbelievable.

45. The pile of documents consisted of approximately 200 pages, neatly stacked, right-side-up, in a location where I was accustomed to sit, there was no reason for the documents to be out of Baer's litigation bag, since they were not relevant to any proceedings scheduled for that day.

46. The copies of the Disputed Documents were not labelled, I unequivocally did not "take" the copies of the Disputed Documents from Baer, or from any one else, and copies of the Disputed Documents were admittedly placed

where they were by Baer or one of his associates, or Special Referee Birnbaum, and not by me or my counsel.

47. Copies of the documents in question were placed prior to my arrival at the place I customarily sat at the conference table in Mr. Birnbaum's room in the New York Courthouse, neatly stacked, unmarked as to confidentiality or character, right-side-up.

48. While I was reading the copies of the Disputed Documents, as I was obviously intended to do, no one of the three persons present for defendants who sat across the table, five feet away from me, made the slightest move to stop me from reading the documents or taking them with me, although they could hardly have avoided seeing me.

49. The Disputed Documents were clearly placed where they were to entrap me, and Baer can not disclaim guilty knowledge without confessing conduct so careless, negligent and stupid as to conflict with his position and ability as counsel.

50. The copies of the documents were, thus placed where I found them so that I would look at them.

51. Any other allegation is disingenuous in the extreme.

52. Defendant Baer, by his actions, had clearly, contrary to his allegations in his affidavit, consented by his acts, whether deliberate or grossly negligent, to my reading and sequestering the copies of the documents.

53. The statement in the Baer affidavit at paragraph 17, that "the Privileged/Work Product Documents unbeknownst to me [Baer]" had already been taken is incredible.

54. It is not possible for Baer, an attorney from the prestige firm of Weil, Gotshal & Manges to overlook over 200 pages of allegedly confidential material under the circumstances here described.

55. The claim in the Baer affidavit at paragraph 19 that he "learned for the first time on July 8, 1991," that I had the copies of the disputed documents is incorrect.

56. The copies of the Disputed Documents, except the one I retained as my claim of right, were returned to defendants' counsel on July 2, 1991. (Lipin Aff. 10/6/92, ¶ 105, incorporated by reference herein.)

57. Baer's affidavit sworn to October 23, 1992 at paragraph 21, admits that his affidavit sworn to July 3, 1991 supplied to this court as Exhibit C to defendants Show Cause Order of July 7, 1992, was perjured; a mere assertion that it had become "superfluous" will not disguise that fact, even though it is a clear admission that my version of my actions was wholly correct in every respect.

58. There is no dispute whatever that the Baer affidavit of July 3, 1991 is false, as are the Jacoby affidavits of July 10, 1992, July 7, 1992, February 3, 1992, October 29, 1991 and July 3, 1991, or that such affidavits were used to procure actions adverse to me on the basis of the misstatements contained therein.

59. Defendants' memorandum at page 15 falsely states that the facts as to my (and my attorney's) misconduct have been established by my testimony. That statement is itself baseless; it draws an incorrect conclusion and mislabels it as fact.

60. The fact is that the copies of the Disputed Documents in question were deliberately or negligently set in front of me, prior to my expected arrival at Mr. Birnbaum's room on June 28, 1991, for me to see and read and take.

61. The conduct of defendants in submitting admittedly false statements compounds their misconduct and ample evidence thereof is found in their memorandum and submitted in the Baer affidavit sworn to October 23, 1992.

62. The above recited facts should without question warrant the stay being lifted.

63. It is unconscionable that persons so cloaked in mendacity as Baer and Jacoby should have been allowed for so long a period to mislead both the state and federal judiciary by liberally repeating their misrepresentations, and compounding them with the further false statement that their prior perjured statements were "superfluous," especially in the light of the extraordinary and irreparable injury done to me as a result.

64. By virtue of such actions defendants and their attorneys have been allowed to

(a) destroy my career as a health professional;

(b) delay the prosecution of my efforts to redress the wrongs done to me by the Red Cross defendants, defendant Bender and the other defendants;

(c) keep me in a state of emotional strain, stress and shock;

(d) allow the perpetrators of these vicious and heinous acts to go scot free despite the existence of state and federal statutory prohibitions against what they have done; and

(e) totally suppress the action that the constitutional guarantee of free speech is supposed to facilitate being taken in a free society to eliminate such abuses and misconduct by persons in power as the Disputed Documents so starkly show.

65. As stated in an editorial in yesterday's New York Times, involving another case in which sexual harassment charges were "swept under the rug" and suppressed rather than being investigated and determined (New York Times, 10/27/92, p. A22, annexed hereto as Exhibit C):

" It is surprising that even today, a year after the Anita Hill-Clarence Thomas hearings supposedly sensitized the nation, men in power still don't take sexual harassment charges seriously. Had they done so in this case, many questions might have been answered, and one or more reputations saved."

66. Even worse, defendants Baer and Jacoby have been allowed to make a complete mockery of both state and federal judicial systems because they have been allowed to twist their requirements in such a way as to stall and divert its normal operations.

67. The substantial damage and injury done to me which needs redress is clearly matched by the damage to the credibility of the judicial system.

68. Finally, Baer in his affidavit sworn to October 23, 1992 at paragraph 14 very carefully and deliberately does not mention the name of my second cousin, whom I have met only once, when he says "that this Court might be biased against her in light of her distant familial relationship ...." "Neither defendants nor their counsel were aware of plaintiff's familial relationship ...."

69. This statement by Baer was known to be false at the time he made it because he was present at my deposition taken on March 14, 1990 when Jacoby not only asked the me the name of my Great Aunt but also demanded that I divulge her address and age. (Lipin Tr. 3/14/92, pp. 420-422, annexed hereto as Exhibit D.)

70. Where defendants and their defendant attorneys have been allowed to flout and reject court orders requiring discovery; commit without discipline acts for which they should have been disqualified and disbarred; shamelessly delay the handling of a court action; procure favorable court actions, both state and federal, by virtue of perjured affidavits; protest conflicts of interests within the attorneys of defendants' law firm of Weil, Gotshal & Manges; seek to manipulate this Court into begetting a reincarnation of a dismissed state proceeding for the purpose of harassing me and depriving me of counsel despite lack of jurisdiction to do so; then it is time to stand back and review objectively what has happened in a light which is free of the prejudice so far engendered.

71. When that is done, the stay of my federal lawsuit will be seen for what it truly is; a means of helping defendants continue to manipulate the judicial system in their favor to the irreparable damage not only to me but to the justice system as well.

WHEREFORE, the motion to vacate should be granted.

Respectfully submitted,

/s/

Joan Carol Lipin

Sworn to before me this
28th day of October, 1992:

/s/

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PART 9

PRESENT:

Hon. Karla Moskowitz
Justice.

Joan Carol Lipin

INDEX NUMBER 15653/89

- against -

MOTION SEQ. NO. 009

Robert M. Bender

Upon the foregoing papers it is ordered that this motion is granted pursuant to decision on record incorporated by reference into this Order.

(Court Reporter, Mitch Siegel)

Clerk directed to enter judgment dismissing complaint as to all defendants pursuant to this Order.

Dated 1-9-92

/s/ Karla Moskowitz
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 9

- -

JOAN CAROL LIPIN,

Plaintiff, INDEX NUMBER: 15653-89

- against -

ROBERT M. BENDER, JR., THE
AMERICAN NATIONAL RED CROSS
AND THE AMERICAN RED CROSS
IN GREATER NEW YORK,

Defendants.

- -

80 Centre Street
New York, New York
January 9, 1992

BEFORE: HONORABLE KARLA MOSKOWITZ, Justice

APPEARANCES:

WISEHART AND KOCH,
Attorneys for the Plaintiff
25 West 43rd Street
New York, New York
BY: ARTHUR M. WISEHART, ESQ.

WEIL, GOTSHAL AND MANGES
Attorneys for the Defendants Bender and the
New York Red Cross
767 Fifth Avenue
New York, New York
BY: LAWRENCE J. BAER, ESQ.
(Continued on next page.)

APPEARANCES: (Continued)
MORGAN, LEWIS AND BOCKIUS
Attorneys for the Defendant American National
Red Cross
101 Park Avenue
New York, New York
BY: BARBARA M. CUMMINS, ESQ.

* * *

THE COURT: I have asked you to stay so I can dictate a decision on to the record in the motion that was argued and which I held a hearing in July of 1991 on the application to -- this is by order to show cause?

MR. BAER: Yes, by order to show cause.

THE COURT: All right. Application by order to show cause, right, made by the defendant on behalf of American Red Cross of Greater New York and Robert Bender, correct?

MR. BAER: Yes.

THE COURT: And joined by the other defendant American National Red Cross?

MISS CUMMINS: Yes.

THE COURT: For various relief. Result of that order to show cause I held a hearing at which the plaintiff Joan Lipin testified. The application asked for disqualification of plaintiff's counsel and suppression and return of the defendant's attorney's work product, as well as other relief.

MR. BAER: Your Honor, as you may recall, subsequent to the hearing we amended our request for relief to include the dismissal of the action based on the evidence presented.

THE COURT: Yes.

MR. BAER: All right.

THE COURT: I know that. In addition, I granted a temporary stay against use of any of the material pending the decision.

What the testimony at the hearing showed-was that the plaintiff has been employed as a paralegal and has helped manage an attorney's office. That is based on her testimony. This is on page 3 2 .

And that on Friday, June 28, the plaintiff and her attorney, the defendants and the other defendant's attorney, as well as the Court Reporter, met with special referee Julius Birnbaum in his office to obtain rulings as to the deposition of Bernard Deutsch pursuant to this Court's directive for discovery. That was supervised by Special Referee Birnbaum.

The plaintiff testified that when she set down at the table she saw a stack of documents in front of her. On top of which was typed 11 Weil, Gotshal & Manges", and underneath that, in caps "Memorandum" and the following line, "Two files," next line, "From: Lawrence J. Bear". Next line "R E, Joan Lipin versus American Red Cross, underlined".

As the attorneys argued to the Special Referee and obtained rulings, the - plaintiff testified that she read through all the papers and then placed them in a folder which she had next to her.

As she left the room with her attorneys, that is when she told Mr. Wisehart that she had seen these papers. He instructed her to place the papers in the sealed envelope, and that is page 30 of the transcript.

There was some argument made that the placement of these papers determined whether or not there had been a waiver of confidentiality by defendant's attorneys. The Court finds that this argument has absolutely no merit.

The uncontroverted proof is that these documents were clearly on their face attorney's work product. Miss Lipin, as a paralegal in her attorney's office, had an obligation to return and turn these over to the lawyer, and he had an obligation to turn them back over to Mr. Baer.

What followed is also uncontroverted. The copies, the plaintiff made copi-es of these documents. Mr. Wisehart consulted with another lawyer, he then utilized these documents to try to extract a settlement.

And then the parties came to me in Court, with the defendants asking for the papers to be kept by Mr. Wisehart without any further distribution or use. The record reflects that

Mr. Wisehart permitted the plaintiff to hold on to a copy of these records, make notes of them over part of the holiday. And that both the plaintiff and her attorney used material from these documents justifying their use on what their interpretation of these items were because of the alleged defamatory content and " other content in these documents that they said proved their contentions in this lawsuit.

I have read and digested the various decisions that have been handed up to the Court. I have reviewed the transcript as well as the arguments of counsel, and I go back to the decision of the Appellate Division in this department from 1987. The case called matter of Weinberg W E I N B E R G 129 Apd. 2d, 126,, involving a law firm's ex parte obtaining and use of what were clearly a confidential attorney-client product.

And that Court stated at page 140 that, 11 Finally, we reject petitioner's attempt to invoke policy considerations to justify disclosure of the privileged material here at issue. Petitioner urges that 11 The interest of justice compel that he be permitted to use these documents to demonstrate the trustee's upon him and upon the Court.

At this stage in the proceedings, however, where the merits of the controversy are far from clear, the interest of justice compel nothing more than that discovery be conducted according to the rules and with the limitations set forth in the CPLR.

Certainly, petitioner acquires no special right to the disclosure of privileged information by claiming that it will be helpful or even necessary to the proof of his case".

The Appellate Division goes on.

This argument is the same argument, Mr. Wisehart

stated to me that the content of the material justifies the use.

There is no justification for the actions that the plaintiff took in this case, and that Mr. Wisehart then took with her. Whatever was in these papers, and I asked to look at the papers because I felt that that was something I should do. I don't even see anything in these papers in relation to this lawsuit. But that really is not necessary for my decision.

After reviewing all of the case law in this area, I have to conclude that the actions of the plaintiff and her attorney were so egregious in taking this material that was clearly the attorney's work product, clearly interviews with the defendant's employees, clearly not for perusal by any other attorney or litigant in this litigation, so heinous that the only remedy, as much as I dislike to do this, is to dismiss the lawsuit. Otherwise, there is no meaning to privilege, there is no meaning to conduct among attorneys, and there is no rule of law.

Whatever was in these papers was confidential. That confidentiality was broken. It was repeatedly broken by both the litigant and the attorney, and cannot be countenanced by the Court.

Therefore, I am dismissing the lawsuit it its entirety. It is unnecessary to consider anything else.

There was a request for attorney's fees. I am not granting that. I am aware of the financial problems that the plaintiff has, and I do not think it will be fair in this context to grant the attorney's fees to the defendant against the plaintiff.

And I am also aware that this lawsuit is important to the plaintiff. However, she was the one that read these materials. Whatever she thought was in this material did not justify taking this confidential information. She has to then suffer the

consequences of the conduct.

Likewise, Mr. Wisehart did not comply with the requirements imposed upon an attorney in this state in his use of the material and failure to guard it.

I have the material here. If you want to place it under seal for possible appeal, you can do that. I prefer the defendants' attorneys takes back the material to hold it if there is an appeal, all right?

MR. BAER: Agreeable.

THE COURT: I do want it kept here in the courthouse or as part of the file.

MR. BAER: Agreeable to the us, your Honor.

THE COURT: All right. That means that any and all material, including anything attached to any motion papers, is to be sealed if it is not returned to counsel.

And counsel, you can keep that material. If there is an appeal, it can be given to the Appellate Court if it wishes.

MR. BAER: Yes, your Honor. My I ask when the plaintiff and plaintiff's counsel must turn over those terms to defendants?

THE COURT: I don't know if there is any left. You will deliver all copies of this material without keeping any part of it at all. All copies, including any notes taken by the plaintiff, you will deliver that within ten days of service of the copy of an order that I am writing out right now. You are not to do anything with that material, and your client is not to do anything with that material in the interim.

MR. WISEHART: All right.

THE COURT: The motion on for today, request for adjournment, the motion is moot as far as I am concerned.

MR. BAER: Yes, your Honor.

THE COURT: And I will deny it as moot.

MR. BAER: Yes.

THE COURT: Thank you. Take back the material.

MR. BAER: Yes.

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

MITCHELL SIEGEL
OFFICIAL COURT REPORTER

SUPREME COURT OF THE STATE OF NEW YORK-
NEW YORK COUNTY

PART 9

PRESENT: Hon. Karla Moskowitz
Justice

- - - - - - - - - - - - - - - -

Joan Carol Lipin INDEX NUMBER 15653/89

- against -

Robert M. Bender, et al

- - - - - - - - - - - - - - - -

Upon the foregoing papers it is ordered that this motion the document attached and the documents attached as Exhibit X to plaintiff's Affidavit dated Oct. 23, 1991 in support of her cross-motion of the same date as Exhibit C has been removed by order of the Court and has been returned to Defendants Counsel to be held with the remaining confidential documents for use in the event of an appeal.

Dated 1/9/92

/s/ Karla Moskowitz
J. S. C.

Sullivan, J.P., Rosenberger, Kupferman, Asch, JJ.

48401-
48401A
Joan Carol Lipin,
Plaintiff-Appellant,

-against-

Robert M. Bender, Jr., The American National Red Cross and American Red Cross in Greater New York,

Defendants-Respondents.

Orders, Supreme Court, New York County (Karla Moskowitz, J.), entered January 27, 1992, which dismissed the complaint as a sanction for plaintiff's improperly obtaining and using confidential documents and returned such documents to defendants' counsel, unanimously affirmed, without costs.

This is seemingly a matter of first impression, the issue being whether, under the unique circumstances presented, dismissal of the complaint is an appropriate sanction for plaintiff's surreptitious removal and use of confidential documents constituting priveleged material and defense counsel's attorney's work product.

The underlying facts are not in dispute. Plaintiff, a former high ranking employee of defendant American Red Cross in Greater New York (NYRC), brought this action for sexual harassment
and discrimination pursuant to New York Human Rights Law and 42 USC §§1983 and 1985.

On June 28, 1991, the parties appeared before Special Referee Birnbaum in a hearing room on the second floor of the New York County Courthouse at 60 Centre Street to argue certain discovery matters. Plaintiff, who since her termination by NYRC had been working as a paralegal for her attorney in this matter, found immediately in front of her at her "customary" location at the counsel table, a stack of documents of some 200 pages. It is unclear why and by whom the documents were placed in that precise location and not otherwise safeguarded, but counsel for defendants were sitting directly across the 12 x 6 foot counsel table.

Typed on the top page of the stack of documents was the heading:

Weil, Gotshal & Manges

MEMORANDUM

Two Files From Lawrence J. Baer

Re: Joan Lipin v American Red Cross

The documents contained a series of internal memoranda prepared by counsel containing notes of various interviews with defendant Bender and other individuals employed or associated with NYRC concerning this action. The documents also included digests of depositions which had previously been taken in this action.

As counsel were engaged in argument concerning certain discovery matters, plaintiff slipped these documents off the table, placed them on her lap, and began to read them.

As plaintiff read through the documents, she recognized that they were interviews with various witnesses

relevant to this action. According to the hearing testimony, "... I decided that I was going to obtain possession of these papers for my own protection." When argument before the Special Referee had ended, plaintiff informed her attorney that she had just read various inflammatory statements taken in interviews concerning her, and that she was "horrified". Counsel stated that he would not read the documents until he had obtained a "second opinion". During the luncheon recess, plaintiff went to counsel's office and copied the documents.

Counsel examined the documents on Sunday, June 30, 1991. According to him, the documents contained inflammatory references to plaintiff, as well as evidence of a "conspiracy to ruin her career." After conferring with the attorney who had originally referred the matter to him, both attorneys formed the opinion that they were entitled to retain the documents under a claim of right, and that any claim of confidentiality had been waived in view of the circumstances of the discovery of the documents - that they had been left unsecured, directly in front of the plaintiff, in a public area, such that plaintiff had been "invited" to read the documents.

Thereupon, plaintiff's counsel requested that opposing counsel attend a "settlement" conference at his offices at 2 p.m. on Tuesday, July 2, 1991. At that time, plaintiff's counsel made various demands, including that Weil, Gotshal & Manges withdraw as counsel based upon a conflict of interest in representing both defendants Bender and NYRC, (2) a monetary settlement, and (3) "suitable action" to withdraw, with an apology, false information allegedly disseminated concerning plaintiff. In response to these demands, defense counsel demanded return of the documents and an explanation as to the manner in which plaintiff had obtained them. Plaintiff's counsel refused to reveal how the documents had been obtained, and also refused to return the copies which had been made, asserting that in any event he had no control over his client,

who could conceivably give the documents to the mass media.

Defendants immediately sought, by order to show cause, an order pursuant to CPLR 3103 suppressing the privileged documents, disqualifying plaintiff's attorney, and imposing sanctions. Pending a hearing, the IAS court directed that no use be made of the documents and that any and all copies made of the documents be secured.

An evidentiary hearing was held, at which plaintiff revealed the manner in which she had removed the documents. Plaintiff admitted that in her employment as a paralegal, she was aware of the nature of the attorney-client privilege. Plaintiff further revealed that counsel had advised her, on the day the documents were obtained, that "you can't lie so you have to say yes, you by mistake picked up his documents . . . ." The plaintiff insisted, however, that the documents were not taken by mistake, but rather, "it was my own recognizance and my own protection . . . ."

Following the hearing, defendants moved to amend their motion to seek dismissal of the complaint, based upon the hearing testimony given by plaintiff.

In a decision spread upon the record, the court found that the documents were on their face clearly attorney's work product, and that plaintiff, as an employee of her counsel, had an obligation to return those documents to opposing counsel. Instead, copies of the documents were made, for which there was "no justification". The Court stated, "I have to conclude that the actions of the plaintiff and her attorney were so egregious in taking this material ... so heinous that the only remedy, as much as I dislike to do this, is to dismiss the lawsuit."

In Matter of Weinberg (129 AD2d 126), counsel for petitioner in a trust accounting proceeding clandestinely obtained, by means of an improperly issued subpoena, discovery of confidential and privileged material from the adverse party's former law firm without notifying that party. This court, in modifying the order of the Surrogate so as to disqualify petitioner's counsel in addition to the previously ordered suppression of the 107 improperly obtained documents, found that the sanction of disqualification, while regrettable, in that it deprived petitioner of his chosen counsel, was necessary "not only to sanitize the proceeding but to prevent the offending lawyer or firm from deriving any further benefit from information obtained and used in violation of basic ethical precepts and statutory obligations .... [T]o impose a sanction short of disqualification would be to treat the conduct at issue with a degree of lenity practically inviting its recurrence. Our principal concern under the circumstances must be to preserve the integrity of the process by which rights are vindicated." (at 143-144).

Under the circumstances of this case, although there is not the premeditation found in Weinberg (supra, at 133), plaintiff's initial conduct is equally or even more egregious in terms of an appropriate sanction inasmuch as it was plaintiff herself who seized the opportunity presented to obtain an unfair advantage over her adversaries in this litigation. Her improper conduct was then compounded by counsel, who could have readily returned the documents or sought further direction from the court, rather than permitting his client to return to his office and make copies of the disputed documents and then sought to take advantage of such improper conduct by scheduling a "settlement conference."

Although plaintiff's contention that CPLR 3103 does not authorize a court to dismiss a complaint for discovery abuses has some facial appeal, as noted by Professor Siegel in

his Commentaries to the section, the factual variations that arise from case to case are limitless and a detailed listing of all possible abuses and remedies would be impractical and unwise.

"If, for any reason sufficient to invoke that undefinable commodity known as judicial 'discretion', an adjustment in the use of disclosure is called for by the facts of any case, CPLR 3103 is at hand to confer the discretion." (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3103:1, at 356).

Thus, although the statute does not list dismissal as a remedy for a discovery abuse, it does not purport to set forth an exhaustive list of remedies, leaving the court the wide discretion to make "an appropriate order" to prevent the abuse of disclosure devices, including but not limited to suppression of information improperly obtained.

Under the unique circumstances presented, particularly the sort of willful misbehavior engaged in by plaintiff and her attorney, we conclude that the IAS court did not improvidently exercise its discretion in invoking the drastic sanction of dismissal of the complaint.

We have considered plaintiff's other points and find them without merit.

Her attempt to portray the defendants.as having engaged in dilatory and sharp practices appears to have but one purpose -- to obscure the issue of her own misconduct. Moreover, there is no support for her claim that defendants waived any attorney-client privilege and, regardless of whether the documents were privileged, the highly improper manner in which they were obtained, combined with their subsequent use by plaintiff's counsel to defendants' detriment, constitutes a sufficient basis for the court's action (see, Matter of Weinberg,

supra, at 136). "[I]t is not unduly harsh to expect and indeed to require that civil litigants gather the information needed to prosecute or defend their actions in conformity with the applicable CPLR provisions." (Supra, at 137).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: May 11, 1993
Clerk

/s/

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 171
Joan Carol Lipin,
Appellant,
v.
Robert M. Bender, Jr., et al.,
Respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Arthur M. Wisehart, for appellant.
Mark A. Jacoby, for respondents.

Professor Jay Carlisle, amicus curiae.

KAYE, CHIEF JUDGE:

At issue on this appeal is the propriety of dismissing plaintiff's complaint as a remedy for misconduct that involved taking and use of the adversary's privileged documents. In the circumstances presented, we affirm the Appellate Division order upholding dismissal as a proper exercise of the trial court's discretion under CPLR 3103(c).

The underlying facts, as found by the Supreme Court and affirmed by the Appellate Division, are essentially undisputed. In February 1988, plaintiff was terminated as Manager of Health Services for American Red Cross in Greater New York, where she had worked for more than two years. Plaintiff thereafter commenced an action for sexual harassment and discrimination pursuant to the Human Rights Law (Executive Law §§ 290, et seq.) and 42 USC §§ 1983 and

1985, against her former supervisor (Robert Bender) and her former employer. She alleged that her refusal of Bender's unwelcome sexual overtures prevented her advancement at Red Cross, ultimately leading to her termination, and that Red Cross itself allowed an environment hostile to its women employees. Plaintiff was represented by Wisehart & Koch (Arthur Wisehart), and defendants Bender and Greater New York Red Cross by Weil Gotshal & Manges (WGM) (Mark Jacoby).

On Friday, June 28, 1991, during the course of increasingly acrimonious pretrial proceedings marked by mutual accusation of abusive tactics, plaintiff and Wisehart appeared at a hearing room in New York County Supreme Court to argue certain deposition issues before a Special Referee. Now employed as a salaried paralegal by her attorney, plaintiff took what she described as her customary place at the conference table. Already on the table at that spot was a stack of some 200 pages, the top sheet beginning:

> Weil, Gotshal & Manges
> MEMORANDUM
> December 8, 1989
> To: File
> From: Lawrence J. Baer
> Re: Joan Lipin v American Red Cross
> * * *
> Meeting with Mary Stanton 9/15/89

The page continued with a summary of counsel's meeting with Stanton, a Red Cross employee, including Stanton's candid impressions of plaintiff and her recounting of Jacoby's legal advice regarding plaintiff's termination.

While the attorneys- -including the author of the file memorandum, WGM associate Lawrence Baer- -were absorbed

in heated exchanges regarding the deposition, plaintiff read the first few pages, then shifted the documents (which she concealed in a folder) to her lap and continued to read, undetected, for more than an hour. In plaintiff's own words: "I wasn't reviewing those papers, I was reading them." Immediately, she recognized the documents as containing the lawyer's interview notes of Red Cross personnel, including defendant Bender, as well as deposition digests.

At a break, plaintiff slipped the documents into a Redweld file "for her own protection," determined to retain them as "material evidence," and in the corridor told Wisehart about the documents and what she had done. Wisehart said that he would not himself read the documents until he had received a "second opinion." Plaintiff told Wisehart that she would not give him the documents unless she could keep a copy. During the luncheon recess plaintiff returned to Wisehart's office where she made three photocopies, "Bates-stamped" them, and--except for one copy she later took home with her- -placed the documents in a locked filing cabinet to which she had a key.

According to plaintiff, Wisehart counseled her that if Baer discovered his documents missing, she must tell the truth: that she had picked them up by mistake. Plaintiff responded that she had not picked them up by mistake, but deliberately, and would not return the originals unless asked to do so by WGM. In consultation with the lawyer who had referred plaintiff's case to him, Wisehart concluded that any claim of privilege as to the documents had been lost as a result of Baer's careless handling of them, and on Sunday evening, June 30, he read through them.

Promptly the next morning, Wisehart wrote to Jacoby that "a recent development causes me to suggest that immediate attention should be given to the subject of settlement from all points of view." At a meeting the following afternoon,

Wisehart confronted defense counsel with the documents and demanded immediate termination of defendant Bender, a "substantial" money settlement and other reparations. When Jacoby asked how he had obtained the documents, Wisehart demurred, citing attorney-client privilege, asserting only that plaintiff had obtained them legitimately.

Wisehart further cautioned Jacoby that plaintiff had retained a copy "for her own protection" and he had no control over what she might do with the information, suggesting that she could release it to the press.

On Wednesday, July 3, 1991, defendants moved for a protective order pursuant to CPLR 3103, and that very day the parties appeared in court. wisehart consented to WGM's request for interim relief, including that plaintiff (herself present in the courtroom) turn over to her lawyer "everything in her possession," and that he secure all copies in his vault. Over the Fourth of July holiday, however, plaintiff hand-copied parts of the documents from the set she retained at home, returning the documents to wisehart on Friday, July 5. Even then, plaintiff kept her handwritten notes, and the documents were placed in the locked cabinet for which she had a key.

Following plaintiff's testimony at a hearing commenced July 8, defendants amended their request for relief to include dismissal of the complaint. Defendants based their request on plaintiff's testimony establishing her "knowing and purposeful course of conduct to misuse the wrongfully acquired information in a blatant violation of accepted moral, ethical and legal standards, and this Court's directive." Her intimate knowledge of these defense documents had caused "irreparable harm" and "forever tainted the conduct of this litigation and * * * severely prejudiced defendants' ability to defend," as "neither plaintiff's memory, nor [Wisehart's] memory can be purged. Because the case was now "poisoned," according to

counsel nothing short of dismissal could remedy the wrongdoing.

In connection with a separate discovery dispute, on July 29 Wisehart filed a motion to compel disclosure with the Special Referee. Jacoby alerted the trial court that plaintiff's memorandum exploited information derived from the disputed documents, contending that this violation of the court's directive underscored the need for dismissal of the action. He pointed in particular to arguments made by Wisehart that Jacoby said could have come only from the interview notes. Throughout the autumn, the parties litigated plaintiff's cross-motion for disqualification of WGM (on grounds they were fact witnesses in the document dispute, and had conspired in plaintiff's termination, a tort) and other disclosure controversies.

After reviewing the documents in camera, in January the court dismissed the complaint, rejecting plaintiff's claim that careless placement of the papers waived their confidential nature. The court found that plaintiff, in retaining the documents and making notes of their contents, had acted contrary to the court's order, concluding that:

> the actions of the plaintiff and her attorney were so egregious in taking this material that was clearly the attorney's work product, clearly interviews with the defendant's employees, clearly not for perusal by any other attorney or litigant in this litigation, so heinous that the only remedy, as much as I dislike to do this, is to dismiss the lawsuit. Otherwise, there is no meaning to privilege, there is no meaning to conduct among attorneys, and there is no rule of law. Whatever was in these papers was confidential. That confidentiality was broken.

> It was repeatedly broken by both the litigant and the attorney, and cannot be countenanced by the Court. Therefore, I am dismissing the lawsuit in its entirety.[1]

The Appellate Division sustained the trial court's exercise discretion, agreeing that plaintiff's own egregious conduct warranted the drastic sanction of dismissal. The highly improper manner in which plaintiff obtained the documents, coupled with subsequent use, in the court's view constituted sufficient for dismissal. Having ourselves reviewed the documents in camera, we now affirm.

I

In that plaintiff continues to defend the legitimacy of her behavior, analysis begins with that issue-

The trial court, and the Appellate Division, could hardly have been clearer in their conclusions, characterizing plaintiff's conduct- -as well as that of her attorney--as "heinous" and "egregious," a threat to the attorney-client privilege, to the concept of civilized, orderly conduct among attorneys, and even to the rule of law.

---

[1] Plaintiff's counsel thereafter simply recommenced the litigation in the United States District Court for the Southern District of New York, on the theory that- -despite the tenor and substance of the trial court's opinion- -the dismissal was not "with prejudice." That litigation has been stayed, pending determination of the present appeal. Counsel also tried, by subpoena, to obtain a copy of the documents for use on appeal, but this Court granted defendants' motion to quash.

Moreover, there is ample support for the affirmed factual findings of wrongdoing by plaintiff, wholly apart from the conduct of her attorney that indisputably compounded it. Having deliberately taken the initial misstep of secretly reading what she recognized as attorneys, confidential documents, plaintiff was presented with several opportunities to purge herself and minimize prejudice to defendants. At each juncture, however, she chose the course of action that exacerbated the harm. Having read the documents, she concealed and then took them. Having taken them, she photocopied them, kept them accessible at the office, and insisted on retaining a set for herself at home. Upon being ordered by the court to return "everything in her possession," she made notes of the documents and, even after surrendering the final copy, held onto the notes. And although plaintiff was present when the trial court instructed Wisehart to secure the documents in his "vault," she placed them in a cabinet to which she had free access.

While the Appellate Division made plain that it would reach the same result whether or not the documents were actually privileged, in fact both courts agreed as to the protected nature of the documents, which plainly fall within the ambit of work product and the attorney-client privilege (see, CPLR 3101[b] and [c]; see also- Spectrum Sys. v Chemical Bank, 78 NY2d 371, 377, 380). Similarly lacking any basis in the record- -as the trial court and Appellate Division further concluded- -is plaintiff's claim that defendants waived the privilege by leaving the documents on the hearing room table during argument before the Special Referee.

There can be no doubt that plaintiff's conduct was- -to say the least- -a breach of the orderly disclosure scheme set forth in CPLR article 31. The question remains whether a proper response to that breach was outright dismissal of the complaint.

II

Plaintiff challenges dismissal of her complaint as both beyond the trial court's power and an abuse of discretion. Neither contention withstands analysis. Turning first to the issue of authority, we note that a good deal of the parties' argument centers on courts' inherent power to punish for contumacious conduct- -understandably so, in that the trial court and Appellate Division both were concerned with intolerable behavior that, unredressed, threatens the entire litigation process. Whether there is power- -inherent or otherwise- -to close the courthouse doors to a plaintiff with "unclean hands" is not, however, the issue before us. Relief was sought under CPLR 3103(c), which was the basis of both courts' review, as it is of ours.

CPLR 3103 governs the subject of "protective orders" for disclosure abuses, and confers broad discretion upon a court to fashion appropriate remedies both where abuses are threatened (subsection [a]) and where they have already occurred (subsection [c]):

> (a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.
>
> (b) Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

> (c) suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that substantial right of a party is prejudiced, the court, on motion may make an appropriate order, including an order that the information be suppressed.

In seeking relief pursuant to CPLR 3103(c), defendants alleged that plaintiff had violated their attorney-client privilege, and that her extensive knowledge of the contents of their private documents impaired the conduct of the defense.

There being no specific mention of dismissal in 3103(c), plaintiff contends that courts lack that power where information is improperly obtained (contrast CPLR 3126 [3], authorizing dismissal as penalty for refusal to comply with order to disclose). We read the statute, however, to confer authority to do exactly what the statute says- -that is, to enter any order, including an order of dismissal, that is appropriate in the circumstances.

The lack of greater specificity in this statute designed to confer broad discretion is hardly surprising. Spelling out the remedies for the limitless potential discovery abuses would not only overwhelm the statute but also needlessly confine the discretion of courts to tailor the remedy to the problem. The Practice Commentary to CPLR 3103 recognizes that:

> If the recognition of possible abuses [of disclosure devices] were to take the form of special or detailed remedies built into different devices, with each one perhaps listing the possible abuses and attempting to remedy them ad seriatim, the disclosure article would be seriously encumbered with little advantage.

> Experience has taught that the variations from case to case are too great and that when an article has as important and pervasive a mission as the disclosure article, the specific approach is unwise.

(Siegel, CPLR Practice Commentaries C3103:1, McKinney's Cons Laws Book 7B, p 356; see also, 3A Weinstein-Korn-Miller, NY Civil Practice, ¶ 3103.02). As the drafters made clear, "there is no limit but the needs of the parties on the nature of the [protective] order or the conditions of discovery" (First Report of the Revisers to the Legislative [1957], No. 6 [b] , p 124). There being power in the trial courts to dismiss a complaint, the question remains whether in this case the remedy of dismissal was an "appropriate" order, or an abuse of the trial court's discretion.

CPLR 3103(c) does provide that "a substantial right of a party [must be] prejudiced" by the improper conduct, focusing attention on the statutory objective of redressing harm or prejudice to the party adversely affected by the conduct. Plainly this is a measure for remediation, not sanction. Obviously, the extreme measure of dismissal- -likely the severest remedy that may be visited upon a plaintiff- -would require serious prejudice to the affected party, irremediable by less drastic steps, a standard we agree was satisfied here.

Defendants urged dismissal because of assertedly irreparable prejudice to the conduct of their defense as a result of the knowledge plaintiff herself had gained through study, retention and copying of their privileged documents. There is no question that plaintiff knowingly and deliberately intruded herself into plainly private communications between defendants and their attorney, and by retaining and hand-copying the documents preserved the information gleaned for maximum advantage to herself (and maximum disadvantage to defendants)

in the litigation. Similarly, there is no question that the information was used to that end. Defense counsel argue that within the first 100 hours after plaintiff obtained the information, it surfaced in "ten separate acts of misbehavior," which they detail, including attempts to extract a "substantial" money settlement. Plaintiff's own recognition that the information would yield significant litigation advantage to her, and consequent disadvantage to her adversary, undercuts any suggestion that the documents were immaterial. Plaintiff's knowledge of course can never be purged.

In these circumstances, we conclude that dismissal was appropriate and not an abuse of the trial court's discretion as a matter of law (see, U.S. Pioneer Electronics Corp. v Nikko Elec. Corp., 47 NY2d 914). Clearly neither suppression of the documents nor suppression of the information was a realistic alternative. Nor would disqualification of plaintiff's counsel have ameliorated the prejudice, in that the wrongdoing and the knowledge were the client's own, which she would carry into any new attorney-client relationship (cf. Matter of Weinberg, 129 AD2d 126, lv dismissed, Matter of Beiny, 71 NY2d 994 [attorney disqualification an appropriate remedy where plaintiff was not infected by attorney's misconduct]). While in Weinberg the court felt it sufficient to require the plaintiff to establish, once new counsel was in place, an independent source for any information that may have also been discoverable through the documents improperly obtained by disqualified counsel, the trial court here reasonably concluded that policing such an order in this instance would be inadequate. In reaching that determination, the nature of plaintiff's misconduct could properly be considered, and indeed the trial court emphasized, in concluding that dismissal was the only practicable remedy here, the persistence of plaintiff's misconduct.

Plaintiff's remaining contentions are without merit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * * * * * * * *

Order affirmed, with costs. Opinion by Chief Judge Kaye. Judges Simons, Titone, Bellacosa, Smith and Levine concur. Judge Ciparick took no part.

Decided November 1, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

JOAN CAROL LIPIN,
Plaintiff,

Index No. 15653/89

- against -

DECISION AND ORDER

ROBERT M. BENDER, JR., THE AMERICAN NATIONAL RED CROSS, and THE AMERICAN RED CROSS IN GREATER NEW YORK.
Defendants.

MARTIN SCHOENFELD, J.:

In this action plaintiff Joan Carol Lipin alleges that defendants Robert M. Bender, Jr., the American National Red Cross, and the American Red Cross in Greater New York ("ARCGNY") are liable to her for sexual harassment and discrimination. At the time of the alleged harassment and discrimination, Bender was the Chief Executive Officer of ARCGNY, and Lipin was its "highest ranking female employee". Defendants now move

> for an Order directing entry of a final judgment:
>
> (a) dismissing the complaint in this action with prejudice; and (b) permanently restraining plaintiff, her agents and attorneys, and all those acting in concert or participa-tion with them, and all other persons, known or unknown, to whom notice shall come, from disseminating to anyone or using in any way, for any purpose whatsoever, the informa-tion contained in defendants' counsel's documents taken by

> plaintiff off of the counsel table in a judicial hearing room on June 28, 1991.

Plaintiff now cross-moves (1) to dismiss defendants' aforesaid motion "for lack of jurisdiction, in view of pending appeals"; or (2), in the alternative, adjourning defendants' motion until after the determination(s) of these appeals and of motions to disqualify defendants' counsel pending in certain federal court actions related to the instant action. For the reasons set forth herein, the motion is granted and the cross-motion is denied.

Background

On June 28, 1991, at a discovery hearing before a Special Referee, plaintiff, who by then was employed as a paralegal in the office of the attorney representing her in the instant action, surreptitiously secreted a series of internal memoranda that were written by defendants' counsel off of a table and into her posses-sion. Plaintiff and her counsel thereafter attempted to use the contents of these documents, copies of which they had made, in settlement negotiations, prompting defendants to demand the return of the documents and to move for suppression of the documents; disqualification of plaintiff's counsel; and, eventually, dismissal of the complaint.

On January 9, 1992 Justice Moskowitz read a decision into the record, stating, in part, as follows:

> the actions of the plaintiff and her attorney were so egregious in taking this material . . . so heinous that the only remedy . . . is to dismiss the lawsuit. Otherwise, there is no meaning to privilege, there is no meaning to conduct among attorneys, and there is no rule of law...

> Therefore, I am dismissing the lawsuit in its entirety. It is unnecessary to consider anything else. . . .
>
> You [i.e., plaintiff and her counsel] will deliver all copies of this material without keeping any part of it at all. All copies, including any notes taken by the plaintiff, you will deliver that within ten days of service of the copy of an order that I am writing out right now. You are not to do anything with that material and your client is not to do anything with that material in the interim.

In an order of the same date, Justice Moskowitz stated as follows:

> this motion is granted pursuant to decision on record incorporated by reference into this order. ... Clerk directed to enter judgment dismissing complaint as to all defendants pursuant to this Order.

On January 17, 1992 plaintiff filed a Notice of Appeal to the Appellate Division, First Department, and applied for a stay of Justice Moskowitz's direction that any copies of defendants documents be returned. On February 27 the First Department denied the application for a stay.

On June 17, 1992 plaintiff commenced an action in the United States District Court for the Southern District of New York alleging sexual harassment and discrimination by the instant defendants.

In a memorandum decision and "short form" order, both dated December 28, 1992, by which date Justice Moskowitz had already recused herself from this case, Justice Carmen Beauchamp Ciparick, then of this court, granted defendants the following relief, "subject to the Appellate Division's determination of plaintiff's appeal":

> plaintiff, her agents and attorneys, and all those acting in concert or participation with them, and all other persons, known or unknown, to whom notice shall come, [are restrained] from disseminating to anyone or using in any way, for any purpose whatsoever, the information contained in the Privileged/Work Product Documents; ....

Furthermore, plaintiff's request that defendants' counsel be disqualified was "denied without prejudice to an application by plaintiff to the Appellate Division for this relief."

Thereafter, plaintiff commenced another action in federal court "arising", in defendants words, "out of the same nucleus of operative facts" as the instant matter.

In a Decision and Order entered May 11, 1993, the Appellate Division, First Department unanimously affirmed Justice Moskowitz's dismissal of the instant complaint "as a sanction for plaintiff's improperly obtaining and using confidential documents" and affirmed her directive that the purloined documents be "returned ... to defendants' counsel." The Appellate Division summarized as follows:

> Under the unique circumstances presented, particularly the sort of willful misbehavior engaged in by plaintiff and her attorney, we conclude that the IAS court did not

> improvidently exercise its discretion in invoking the drastic sanction of dismissal of the complaint.

Defendants contend, although plaintiff disputes -- and this court finds it unnecessary to decide -- that the Appellate Division also rejected an argument that defendant's counsel should be disquali-fied.

In an order dated October 5, 1993, the Appellate Division granted plaintiff permission to appeal the Appellate Division's May 11, 1993 affirmance to the Court of Appeals since "questions of law have arisen which ought to be reviewed by the Court of Appeals." It appears that oral argument is currently scheduled before the Court of Appeals on September 22, 1994.

Discussion

Before addressing the specific issues presented here, this Court feels compelled to opine that -- whatever the intentions of the parties and their attorneys -- the instant applications embody an unfortunate example of litigation run amok. Lawyering and adjudication are not, or at least should not be, such arcane, abstruse arts that the practitioners thereof cannot understand one another, or follow simple rules and directions.

Plaintiff commenced a garden-variety lawsuit. During discov- ery, she and her counsel knowingly obtained documents belonging to her adversaries. A judge ruled -- rightly, wrongly, or indiffer-ently that the documents should be returned and the case should be dismissed. An appellate court affirmed. The state's highest court will soon be reviewing the matter.

This simple, straightforward history notwithstanding, a slew of motions, appeals, applications, and even other lawsuits

in another court have mushroomed up, inordinately consuming judicial and other resources. This court hopes that in its own small way today's decision will help to put the entire matter to rest. In any event, sanctions are always at hand where an attorney's zealous advocacy crosses the border into obstinate refusal to take "no" for an answer. Litigation, like life itself, must one day come to a close.

Defendants' Motion

It is clear from Justice Moskowitz's opinion that she intended her dismissal to be "with prejudice." Cf. Strange v. Montefiore Hospital and Medical Center, 59 NY2d 737 (1983) (summary judgment dismissing a medical malpractice action in which an order of preclusion had been entered against plaintiff was on the merits for res judicata purposes, since to hold otherwise would allow plaintiff to "circumven(t] the preclusion decree). In now directing the court clerk to enter a final judgment reflecting the reality of this dismissal, this court is merely ordering the consummation of a previous determination by a judge who subsequently recused herself. Such a direction is purely ministerial and remedial in nature.

Furthermore, Justice Moskowitz made absolutely clear that what plaintiff and her counsel did with defendants' documents was, to the extent possible, to be undone. This determination was also unqualified, subject only to plaintiff's right to appeal. Thus in granting the relief now requested by defendants, this Court is merely attempting to clarify -- assuming any further clarity is necessary -- and to effectuate -- assuming any further effectuation is necessary -- what has already been decided.

Plaintiff's Cross-Motion

Plaintiff's argument that due to the pending appeals this court is without jurisdiction over defendant's motion is unavailing because, as noted above, the motion simply involves a clarification and/or effectuation of prior determinations, and in no way impedes or undermines any pending appeals. By the same token, there is no reason to adjourn the instant motion until matters are further resolved above, especially since there is some reason to believe that the Appellate Division is waiting for this court to act. Obviously, if the Court of Appeals reverses the Appellate Division, this Court will simply reinstate the case.

We also see no reason for this court to await the federal court's determination of the disqualification issue(s) before it. Each court has authority over the representation issues arising therein. Finally, that plaintiff has made a motion before this court, presently returnable in late September, to disqualify defendants' counsel, does not prevent this Court from simply clarifying and effectuating what has already been done. There is nothing in Chang v. Chang, 190 A.D.2d 311 (1st Dep't 1993) (disqualification of attorney with personal interest in, and personal knowledge of, matters in issue), which plaintiff's counsel purports to rely on, that even remotely suggests to the contrary.

Thus, for the reasons set forth herein, (1) the clerk of this court is directed to enter a judgment dismissing the instant action with prejudice, pursuant to the decision and order of Justice Karla Moskowitz, dated January 9, 1992; and (2) plaintiff, her agents and attorneys, and all those acting in concert or participation with them, and all other persons, known or unknown, to whom notice shall come, are permanently enjoined from disseminating to anyone or using in any way, for any purpose whatsoever, the information contained in

defendants' counsel's documents taken by plaintiff off of the counsel table in a judicial hearing room on June 28, 1991.

This opinion constitutes the decision and order of the Court.

Dated: August 18, 1994

J.S.C.

FILED AUG. 24, 1994
COUNTY CLERK'S OFFICE
NEW YORK

DOCKETED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff

- against -

ROBERT M. BENDER, JR., THE AMERICAN NATIONAL RED CROSS AND AMERICAN RED CROSS IN GREATER NEW YORK,

Defendants.

IAS Part 15

Index No. 15653/89

JUSTICE MARTIN SCHOENFELD

FINAL JUDGMENT

Defendants having moved this Court for an Order, pursuant to Section 3103 of the CPLR and the inherent powers of this Court, dismissing this action, directing that plaintiff return certain privileged/attorney work product documents taken by plaintiff off of the counsel table in a judicial hearing room on June 28, 1991, (the "Privileged/Work Product Documents"), suppressing the use of the Privileged/Work Product Documents and the information contained therein, and for other relief; and said motion having come on to be heard on July 3, 8, 9 and 11, 1991 before the Honorable Karla Moskowitz, Justice of this Court, at an IAS part, and an Order having been signed by Justice Moskowitz on January 9, 1992, directing entry of judgment dismissing this action, directing that plaintiff return the Privileged/Work Product Documents to defendants' counsel and suppressing the use of the Privileged/Work Product Documents and the information contained therein; and said

Order having duly been entered on January 27, 1992; and said Order have been unanimously affirmed by the Supreme Court, Appellate Division, First Department, by a Decision and Order of that Court, dated and entered May 11, 1993; and defendants having moved this Court, by Notice of Motion, dated May 21, 1993, for an Order directing entry of Final Judgment dismissing the Complaint, with prejudice, and making permanent its previously issued suppression order enjoining the use and dissemination of, for any purpose whatsoever, the information contained in the Privileged/Work Product Documents, and said motion having been heard on August 9, 1993, before the Honorable Martin Schoenfeld, Justice of this Court, at an IAS part, and an Order having been signed by Justice Schoenfeld on August 18, 1994, granting said motion, and said Order having been duly entered on August 24, 1994;

Now, on motion of Weil, Gotshal & Manges, attorneys for defendants, it is:

ADJUDGED that the complaint is dismissed, with prejudice, against all defendants; AND THAT DEFENDANTS RECOVER OF PLAINTIFF THE SUM OF $200 COSTS OF THE ACTION AND THAT DEFENDANTS HAVE EXECUTION THEREFOR.

FILED AUG. 31, 1994
COUNTY CLERK'S OFFICE,
NEW YORK

NORMAN GOODMAN
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOAN CAROL LIPIN,

Plaintiff,

- against - INDEX NO. 15653/89

ROBERT M. BENDER, JR., THE AMERICAN NATIONAL RED CROSS and AMERICAN RED CROSS IN GREATER NEW YORK

COMPLAINT

Defendant.

Plaintiff, by her attorneys WISEHART & KOCH, for her verified complaint against defendant, alleges and states:

1. Plaintiff is a female who is a citizen and resident of the State of New York, County of New York. She is by training and experience a professional administrator and manager in the field of health care services. Her date of birth is August 25, 1947.

2. Defendant Robert M. Bender, Jr., is a resident of the State of New York, County of New York, who is and was the General Manager/Chief Executive Officer and Secretary of the American Red Cross in Greater New York.

3. Defendant American National Red Cross ("American Red Cross") is a membership corporation created by special Act of Congress, 36 U.S.C. §§ 1-16, and is subject to being sued in this Court pursuant to 36 U.S.C. § 2.

4. Defendant American Red Cross in Greater New York ("New York Chapter") is an agent, division, chapter, constituent body and instrumentality of the American National Red Cross that is established and chartered as a part thereof pursuant to said special Act of Congress.

5. Said special Act of Congress requires the New York Chapter to be administered in compliance with the policies and rules of the American Red Cross as determined from time to time by the Board of Governors of the American Red Cross (36 U.S.C. § 4a).

6. The Red Cross defendants are operated under common policies, rules, management and control by the Board of Governors of the American Red Cross.

7. The New York Chapter is an agent and executive unit of the American Red Cross which has and maintains offices at 150 Amsterdam Avenue, New York, New York 10023.

8. Effective January 6, 1986, plaintiff was hired by defendants as Assistant Manager of Health Services at a salary of $52,000 per annum, plus certain benefits. She reported to defendant Bender who was Manager and later General Manager of the New York Chapter. Effective July 1, 1986, plaintiff was promoted to the position of Manager of Health Services.

9. During the discussions leading up to her employment, plaintiff stated to defendant Bender that she expected that her becoming a Red Cross executive would be her last career move, that she was dedicated to the objectives of the Red Cross, and had been all of her life, having been greatly influenced by the health care tradition established by Clara Barton and Florence Nightingale, and made that a condition of her employment. Bender agreed.

10. Plaintiff's position generally required her to manage and coordinate five Red Cross chapters and six programs which provided health services to client populations in the Greater New York area. Her position was entitled Assistant Manager for Health Services.

11. Plaintiff was competent to enter upon her position above described and her work performance was satisfactory or better throughout the time of her employment.

12. Plaintiff at all times was and continues to be qualified to perform the duties of her position. She was assigned the difficult task of restructuring the organization by Bender, and performed that assignment capably and well.

13. However, the proper restructuring of the organization required that Bender's position be redefined, and that corrective action be taken regarding his repeated violations of Red Cross policies and procedures. Defendant Bender repeatedly violated defendants' policies and procedures, and was and is not qualified to hold his position as General Manager and Chief Executive Officer of the organization.

14. In the performance of her duties, plaintiff earned a reputation for professional excellence and integrity, and adhered to defendants' policies and procedures. At the time of her termination plaintiff's salary had been increased to approximately $63,000.

15. However, because of her sex, plaintiff's rate of compensation was lower than that paid by defendants to male employees of comparable qualifications and responsibilities, on information and belief.

16. Further, despite many commendations of her work, plaintiff was never given a written performance evaluation by

Bender as required by defendants' policies and procedures.

17. Defendants engaged in sexual discrimination against women executives throughout the organization, and permitted the male employees, including defendant Bender and his predecessor as Manager, Robert Shea, to treat female employees, including plaintiff, as playthings who were fair objects of sexual harassment, favors, and sexual stereotyping. Further, throughout plaintiff's period of employment, defendant Bender repeatedly sought to coerce her into taking improper discriminatory action against other female employees despite the fact that the actions requested were not within plaintiff's job responsibilities, in addition to being unlawful.

18. Plaintiff was sexually harassed, intimidated and stereotyped by defendant Bender, and the denial and delay of promotions and pay increases by defendants and her ultimate ouster were based upon and in retaliation for her resistance to said discriminatory acts and for her repeated attempts to bring Bender's discriminatory acts to the attention of the top management of defendants.

19. Shortly after plaintiff's employment, defendant Bender began to take advantage of his position unprofessionally in his dealings with plaintiff. Defendant Bender insisted on plaintiff's staying after hours in the office and then driving plaintiff home. In the process, Bender repeatedly made sexual advances to plaintiff, placing his hands on her legs and thighs, and aggressively seeking to move his hands to plaintiff's private parts, all of which plaintiff resisted. Bender also insisted on telling plaintiff weird stories about past sexual escapades.

20. Said acts by Bender resulted in a high degree of trauma on the part of plaintiff, causing her to cry uncontrollably and to suffer many sleepless nights. To avoid the advances of

defendant Bender, her supervisor, plaintiff insisted on obtaining the assignment of her own car, to which she was entitled as a part of her position, so that she could avoid riding home with Bender, whereupon Bender became angry, antagonistic and vindictive.

21. In early 1986 Bender importuned plaintiff to have an affair with him.

22. Plaintiff at all times made it clear to Mr. Bender that she did not wish to enter into any such personal relationship and specifically rejected his attempt to have sexual relations with her.

23. Prior to such rejection, defendant Bender had been most laudatory of plaintiff's job performance. After the rejection of his demand that plaintiff have an affair with him, Bender became critical of her work without warrant, (a) by criticizing her incorrectly and unjustly for not having good relations with her subordinates, (b) by falsely making adverse comments on plaintiff's performance and personal characteristics in the presence of plaintiff's subordinates and her co-workers, (c) by deferring a raise in plaintiff's salary for months after it was due in July 1987, and (d) by redefining and limiting her job description, all in retaliation for plaintiff's resistance to Bender's sexual overtures and demands. Bender also sought to interfere with plaintiff's personal life by telling her that she should not marry and have children.

24. By such actions and activities, defendants intended to and did discriminate against plaintiff because of her sex. Age discrimination against plaintiff was coupled with defendants' acts of sexual harassment against her. Plaintiff was over the age of forty at the time of her termination by Bender, who by then had very visibly and unprofessionally demonstrated his preference for females within the organization

who were younger as well as submissive to his sexual advances and stereotyping.

25. Bender's acts of sexual harassment caused trauma, severe depression, insomnia, withdrawal, and uncontrollable fits of crying on the part of plaintiff. Plaintiff's effectiveness as a professional health care manager for the Red Cross was impaired and her relationships with others were adversely and permanently affected as a result.

26. Throughout plaintiff's employment, defendant Bender continued to demonstrate that he expected plaintiff to have sexual relations with him by manipulating his penis suggestively and stating to plaintiff repeatedly that "you know what you have to do" when she raised questions regarding her job description and duties of employment, promotion, pay increases and performance evaluation.

27. Defendant Bender also sexually compromised and harassed other female members of the staff. By such acts of discrimination and harassment and sexual stereotyping inflicted on plaintiff and other female employees, defendants created a pervasively hostile, intimidating and offensive work environment that undermined the psychological well being and subverted the work performance of plaintiff and other female members of the staff. The functioning of the organization as well as plaintiff's assigned task of restructuring it and installing professional management standards were adversely affected as a result.

28. The hostile environment created such stressful working conditions for female employees that one who had complained of sexual harassment by Bender and suffered a miscarriage, terminated her employment early in another pregnancy upon the recommendation of her physician, and plaintiff suffered a severe sinus infection induced by stress.

29. In desperation, plaintiff sought assistance from another woman on her staff, Marion Foster. Foster, Director of Health Education of the New York Chapter, was a career employee of the American Red Cross who had been a Red Cross disaster nurse for many years. Although sympathetic, Foster was only able to confirm plaintiff's worst fears, namely, that such sexual harassment had become embedded as a pattern or practice, and that there was a conspiracy of silence in the organization about the situation. Foster said that the women employees had made the most effective contributions to the Red Cross, but that the men took the credit and got control of the levers of power. Foster said that it was common knowledge that male Chapter managers in the Red Cross had affairs with their female staff members, creating all kinds of problems in the effective administration of the agency. Foster also stated that Bender was not qualified to be the General Manager of the New York Chapter.

30. Plaintiff complained about Bender to another staff member, Angelo Cinti, who repeatedly advised her to say nothing about Bender's importunities, confirming the conspiracy of silence.

31. In November 1987, plaintiff complained to Mary Stanton, Human Resource Administrator in the Personnel Department. Other female employees also complained to Stanton about sexual harassment by Bender. However, Stanton had been hired by and reported to Bender, and no action was taken by the Red Cross. Word of plaintiff's complaints about Bender's conduct undoubtedly reached Bender.

32. When plaintiff complained about Bender's acts of sexual harassment to Loring Wood, an Executive Board member of defendants' New York Chapter (Manhattan Chapter), who reports directly to Delbert Staley, Chairman of the New York Chapter, Wood did nothing about plaintiff's

complaint but made a sexist remark by saying, "It's a good thing you didn't [give in to Bender's importunities] or you might have AIDS."

33. On information and belief, instead of taking action in the Red Cross and causing an appropriate investigation to be conducted, Loring Wood and others conspired with Bender to oust plaintiff and to tarnish and stigmatize plaintiff's reputation in order to make it impossible for her to find employment after she was ousted by Bender. Wood and Staley are top officers of NYNEX, one of the companies with which plaintiff subsequently sought employment without success.

34. In furtherance of said conspiracy, Bender interfered with and manipulated plaintiff's own staff members and others who were opposed to implementing plaintiff's plan of reorganization in order to create a pretext for ousting plaintiff.

35. In December 1987, Bender coerced plaintiff into approving, over her objection, an uncalled for salary increase for one of her own staff members, Ron Frick, an employee of marginal qualifications who was insubordinate to plaintiff and disruptive of plaintiff's reorganization efforts. Said inordinate salary increase for Frick was unjustified, contrary to Red Cross policies and procedures, and nothing but a concealed bribe to Frick to foment unrest and opposition to plaintiff within plaintiff's own staff.

36. Shortly after plaintiff's complaint to Mary Stanton late in 1987, defendant Bender again made outrageous sexual advances in an attempt to put plaintiff into a compromising situation so that she would not pursue her complaint of sexual harassment further. Plaintiff angrily resisted and again complained to staff members Cinti, Foster and Stanton.

37. Plaintiff thereupon encountered increasingly adverse comments from Bender, despite her continued good job performance, and despite the specific approval by the American Red Cross in Washington of the marketing plan that plaintiff had developed, and its disapproval of Bender's marketing plan in January 1988.

38. On February 1, 1988, Bender told plaintiff that she was eligible for a further salary increase of five (5) percent, but that it would not be retroactive to July 1, 1987, in violation of personnel policies and procedures applied to other members at that time, and further stated for the first time that plaintiff was on probation for three months, and told her to "think about" what she was going to do, meaning for her to "think about" whether she would accede to his sexual demands. Plaintiff again angrily told Bender no.

39. On February 5, 1988, Bender abruptly and without any advance notice, called plaintiff into his office at 4:30 p.m. and terminated her, on the false pretext that her relations with other members of the staff, which Bender himself had undermined, were unsatisfactory. Said action by Bender was deliberately intended to humiliate plaintiff. Defendant also attempted to coerce plaintiff into falsely telling others that she had resigned out of fear of retaliation. Bender announced to plaintiff that she must clear out immediately, that she was not to return, and that he had arranged for a staff member, Angelo Cinti, to escort her from the building.

40. When plaintiff called Loring Wood on February 8, 1988, and told him she had been fired by Bender, he merely laughed sarcastically, and would take no action within the Red Cross.

AS AND FOR A
FIRST CAUSE OF ACTION

41. Defendants' acts of sex discrimination against plaintiff combined with elements of age discrimination as alleged above were unlawful, known to be unlawful by defendants when they were committed, and were deliberately and intentionally performed with actual malice against plaintiff.

42. Said acts were contrary to the public policy of the State of New York and in violation of the New York Human Rights Law.

43. Plaintiff is entitled to the judicial remedies provided in Section 297(9) of the Human Rights Law for said violations.

44. Defendants' wrongful and malicious acts of sex discrimination against plaintiff as alleged above were intended to and did cause plaintiff severe mental anguish and emotional distress to plaintiff's great injury.

45. By reason of the foregoing wrongful acts, plaintiff suffered the destruction of her career and reputation, severe financial loss, and mental and emotional trauma for which defendants are chargeable.

AS AND FOR A
SECOND CAUSE OF ACTION

46. Plaintiff repeats and realleges the allegations of paragraphs 1 through 45.

47. Defendants' actions against plaintiff as alleged above were willful, vindictive, wanton and malicious, and violative of public policy. Said actions and the method and

manner employed by defendants to discriminate against and ultimately to oust plaintiff (a) were motivated by actual malice to plaintiff, (b) were so extreme and outrageous as to go beyond all possible bounds of decency, and (c) were such as to be utterly intolerable in a civilized community. They were intended to and did cause plaintiff severe shock, injury, trauma, mental anguish and emotional distress of a nature that no reasonable person could be expected to endure.

48. Following her termination, plaintiff was subjected to a vicious campaign of harassment and abuse by defendants through surreptitious activities with others including prospective employers, and plaintiff has not been able to obtain employment since that time.

49. Plaintiff requests actual damages and punitive damages to deter defendants and others from participating in or tolerating such outrageous and unlawful conduct in violation of public policy.

AS AND FOR A
THIRD CAUSE OF ACTION

50. Plaintiff repeats and realleges the allegations of 1 through 49 above.

51. At the time of plaintiff's employment it was understood and agreed in writing by defendants that personnel for all job levels within the organization would be sought through promotion from within by upgrading, whenever possible, and that sex discrimination and harassment would not be practiced.

52. Said agreement also provided that plaintiff's performance would be evaluated by her supervisor.

53. Further, said agreement provided (a) that employees were hired for their work life expectancy, namely, "with the expectation that they will remain with The American Red Cross in Greater New York as long as their performance is satisfactory and their services are needed.", (b) that an employee would not be terminated unless he or she "is unsatisfactory on the job or for violation of The American Red Cross in Greater New York regulations.", (c) that such action would not be taken except following proper review of the case through the Personnel Department, and (d) that corrective action will be taken rather than termination when possible.

54. Plaintiff provided consideration for said agreement and the terms thereof by accepting defendants' offer and providing dedicated professional services to defendants in reliance thereon.

55. Defendants breached each of the foregoing provisions in their agreement with plaintiff, to her loss and damage. It was foreseeable to defendants that plaintiff's career would be wrecked by said breaches, and that has occurred.

56. But for defendants' violation of said agreement as alleged above, (a) Bender would have been disciplined and the Red Cross defendants would have taken the corrective action needed to purge the illegal and abusive practices of sexual discrimination and harassment that had been tolerated and had become a pattern of conduct in their organization, (b) plaintiff would still be an executive employee of the Red Cross, (c) plaintiff would have been promoted to a higher position for her contribution in restructuring the organization, and (d) the Red Cross would be ridded of such pernicious discriminatory practices as practiced by Bender and his executive allies and co-conspirators. Instead, however, plaintiff's career as a manager of health care services has been destroyed as a result of defendants' acts.

AS AND FOR A
FOURTH CAUSE OF ACTION

57. Plaintiff repeats and realleges the allegations of 1 through 56 above.

58. Following plaintiff's termination, defendant Bender has engaged in a conspiracy and campaign to stigmatize, vilify, and to defame her, ruining her reputation and making it impossible for her to secure other employment.

59. On or about October 1988, defendant Bender stated to Edmund O. Rothschild, who had offered to help plaintiff secure other employment, that plaintiff "didn't know anything about marketing."

60. Said statement was false and was known by defendant Bender to be false when he made it and was made by him with actual malice and with the wilful intent to injure plaintiff. The marketing of health services is one of plaintiff's specialties in which she has had extensive experience, and in fact, it was her marketing plan that defendant American National Red Cross approved when it rejected the marketing plan proposed by defendant Bender in January 1988, shortly before Bender ousted plaintiff from employment in an effort to conceal his own incompetence and acts of sexual harassment.

61. On information and belief, defendant Bender further defamed plaintiff by falsely stating to Loring Wood, Rothschild and other prospective employers that plaintiff "did not have supervisory skills."

62. On information and belief, defendant Bender further defamed plaintiff by falsely stating to Rothschild and others to whom plaintiff complained after her termination that it was plaintiff who had made sexual advances to him.

63. On information and belief, defendant Bender made the same defamatory statements and has engaged in a conspiracy to abuse plaintiff and wreck her career by interference with her prospective employers by publishing and repeating to others the defamatory statements alleged above.

64. Said slanderous statements were false and were known by defendant Bender to be false and were made with actual malice to plaintiff with willful intent to injure plaintiff and with the knowledge that they would be spread through the grapevine in the health care industry and repeated to others from whom plaintiff sought employment, causing irreparable injury to the reputation of plaintiff that can never be redressed. Defendant Bender conspired with Rothschild, Wood and other co-conspirators to publish and repeat said statements to others with the deliberate intent of ruining plaintiff's reputation and destroying her career.

65. But for the dissemination and publication of said statements, plaintiff would have obtained satisfactory employment and at a higher rate of compensation than she had at Red Cross based on her qualifications and experience.

66. Said activities of defendants have made it impossible for plaintiff to resume her career and profession.

67. Said defamatory statements and acts of defendants (a) were vindictive, wanton and malicious, and made with express malice or in reckless or grossly negligent disregard of the rights of plaintiff, (b) were for the unlawful purpose of deterring others from seeking redress for such violations of their rights and (c) were in furtherance of the conspiracy to conceal and suppress disclosure of the pattern or practice of sexual discrimination and abuse within the Red Cross. Shortly after plaintiff's termination, in fact, defendant Bender caused a personnel "workshop" to be held in the Red Cross for the

specific purpose of intimidating and coercing employees not to file complaints or sue because of such discriminatory and abusive employment practices.

68. By reason of the foregoing, plaintiff has been damaged and injured in her reputation and standing in her profession, and has been subjected to great shame, humiliation, and indignity. Plaintiff has been prevented from securing employment from the time of termination to date, resulting in special damages of $142,855 in lost compensation to the date hereof. Further, plaintiff's profession and career in health services has been demolished, and plaintiff's resulting damages from lost compensation in said profession and career for her work life expectancy is $2,900,000.

AS AND FOR A
FIFTH CAUSE OF ACTION

69. Plaintiff repeats and realleges the allegations of 1 through 68 above.

70. Said acts as alleged above constitute a conspiracy by defendants and other parties presently unknown that was and is motivated by class-based, invidiously discrimina-tory animus against plaintiff and other female executives that deprives them of due process and equal protection of the law, and their privileges and immunities under the law.

71. Defendants are and continue to be motivated by an invidiously discriminatory animus against the class of women in executive positions who resist being treated as playthings available for sexual harassment and stereotyping by male executives, particularly those supervisory personnel to whom they report, such as Bender, who conspire with other male executives to retaliate against, punish, defame and interfere with

the employment of women executives who seek remedies for acts of sexual harassment and discrimination encountered from such male executives having coercive supervisory powers over them, and who have the ability to manipulate the levers of power so as to retaliate against the denial of sexual favors by creating a pretext for the ouster, suppression and silencing of female employees. Said acts of retaliation were committed with actual intent to inhibit and block plaintiff and other women executives from exercising or seeking to exercise their civil rights.

72. Said illegal actions also were in violation of plaintiff's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, and plaintiff's rights as a woman to exercise and seek enforcement of her Civil Rights, and to obtain equality of opportunity of employment and redress for outrageously degrading and discriminatory practices, sexual harassment and stereotyping in connection therewith, and acts in furtherance thereof resulting in injury to the person or property of plaintiff, a victim of said acts and conspiracy, all of which is in violation of 42 U.S.C. § 1985 (3).

73. In addition, said illegal actions by defendant Bender and the willful concealment of and participation therein by the Red Cross defendants were activities conducted under color of State and Federal Law that are violative of the Constitutional and Civil Rights of plaintiff, a citizen of the United States, for redress of which plaintiff claims damages in an action at law pursuant to 42 U.S.C. § 1983.

WHEREFORE plaintiff demands judgment as follows:

(a) Awarding plaintiff compensatory and resulting damages in the amount of $2,900,000 including $142,855 in lost compensation to date, together with such additional damages as plaintiff shall prove at trial for shock, trauma, mental anguish and emotional distress;

(b) Awarding plaintiff $2,000,000 in punitive damages;

(c) Awarding plaintiff recovery for reasonable attorney's fees, reasonable expenses, costs and disbursements of this action; and

(d) Providing such other and further relief as to this Court seems just and proper.

Dated: New York, New York
August 12, 1989

WISEHART & KOCH

Attorneys for Plaintiff
25 West 43rd Street,
Suite 1114
New York, New York 10036
(212) 730-0044

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOAN CAROL LIPIN, being duly sworn, deposes and says:

I am the plaintiff in the within action; I have read the foregoing complaint and know the contents thereof; the same is true to my knowledge insofar as it involves my claims against defendants, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

/s/

Joan Carol Lipin

Sworn to before me this

12th day of August 1989:

/s/

Notary Public

28 U.S.C. § 1738 State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, c. 646, 62 Stat. 947.)

36 U.S.C. § 2. Name of Corporation; powers

The name of this corporation shall be "The American National Red Cross", and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out it purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four and July twenty-seventh, nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish bylaws and regulations not inconsistent with he laws of the United States of America or any State thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of sections 1, 2 to 6, 8, and 9 of this title and promote the purposes of said organization; and the corporation created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority.

(Jan. 5, 1905, c. 23, § 2, 33 Stat. 600; May 8, 1947, c. 50, § 3, 61 Stat. 81.)

42 U.S.C. § 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs about to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

(R.S. § 1981)

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

* * * * *

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

(3) Depriving person of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to

prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for the President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more person engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against anyone or more of the conspirators.
(R.S. § 1980.)

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(R.S. § 1977; Pub.L. 102-166, Title I, § 101, Nov. 21, 1991, 105 Stat. 1071.)

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

New York Civil Practice Law and Rules

§ 3103 Protective Orders

(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure devices. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(b) Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

(c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion may make an appropriate order, including an order that the information be suppressed.

(L.1962, c. 308; amended L.1993, c. 98, § 5.)

New York Civil Practice Law and Rules

§ 205. Termination of action

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies, and the cause of action survives, his executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.

(b) Defense or counterclaim. Where the defendant has served an answer and the action is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the plaintiff or his successor in interest, the assertion of any cause of action or defense by the defendant in the new action shall be timely if it was timely asserted in the prior action.

(c) Application. This section also applies to a proceeding brought under the workmen's compensation law.

(L.1962, c. 308; amended L.1963, c. 541, § 1; L.1965, c 233; L.1978, c. 51, § 1.)

New York Civil Practice Law and Rules

Rule 5013. Effect of judgment dismissing claim.

A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise.

(L. 1962, c.308)

New York Judiciary Law

§ 487. Misconduct by attorneys

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Willfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Added L.1965, c. 1031, §123

UNITED STATES CONSTITUTION

ARTICLE VI

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(2)

Supreme Court, U.S.
FILED
NOV 17 1997
CLERK

No. 97-674

In The

Supreme Court of the United States

October Term, 1997

JOAN CAROL LIPIN,

Petitioner,

vs.

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, JESSE D. WOLFF, JAMES T. BYRNE, JR., CARL DESCH and BARBARA E. FLETCHER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED

Did the Second Circuit Court of Appeals correctly conclude, based upon New York State claim preclusion law, that the dismissal, with prejudice, of petitioner's prior state court action based upon petitioner's "heinous" and "egregious" litigation misconduct, precludes the prosecution of her identical and "transactionally related" claims in federal court?

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

The American National Red Cross is a federally chartered corporation created by an act of Congress, 36 U.S.C. § 2. The American National Red Cross has no parent company. The American Red Cross in Greater New York is a unit chartered by the American National Red Cross. Neither the American National Red Cross nor the American Red Cross in Greater New York has any subsidiaries that are not wholly owned.

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OPINIONS BELOW

The United States Court of Appeals for the Second Circuit's Corrected Summary Order, dated May 22, 1997, 113 F.3d 1229 (2d Cir. 1997) (unpublished table decision) (1a-18a)[1] is the decision that is subject to review by this Court. Petitioner erroneously asserts that the Second Circuit's Summary Order, dated December 12, 1996, 104 F.3d 355 (2d Cir. 1996) (unpublished table decision) (20a-27a) also is subject to review by this Court. However, the Second Circuit's December 12, 1996 Summary Order was expressly vacated in its subsequent May 22, 1997 Summary Order. Thus, the Second Circuit's December 12, 1996 Summary Order is not subject to review by this Court.

STATEMENT OF THE CASE

A. The Dismissal of Petitioner's Prior State Court Action

On January 9, 1992, petitioner's prior New York State court action, *Lipin v. Robert M. Bender, Jr., The American National Red Cross and American Red Cross in Greater New York*, N.Y. Sup. Ct. Index No. 15653/89 ("*Lipin I*"), was dismissed pursuant to New York Civil Practice Law and Rules ("CPLR") § 3103(c) to remedy petitioner's "heinous" and "egregious" litigation misconduct. In a ruling that was affirmed by the New York Court of Appeals,[2] the state trial court found, largely based upon petitioner's own undisputed testimony, that petitioner had surreptitiously removed privileged documents belonging to

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1. Citations followed by the suffix "a" refer to the Appendix annexed to the Petition for a Writ of Certiorari, dated October 16, 1997.

2. *Lipin v. Bender*, 84 N.Y. 2d 562, 644 N.E. 2d 1300, 620 N.Y.S. 2d 744 (1994) (322a-333a). Petitioner did not seek a Writ of Certiorari from this Court to review the New York Court of Appeals' determination affirming dismissal of her state court action.

defendants' counsel from the counsel table in a state courthouse hearing room while defendants' counsel was otherwise occupied in a hotly contested oral argument to resolve certain discovery disputes. The privileged documents included summaries of defendants' counsel's interviews of the individual defendant and the corporate defendants' employees. The court found that petitioner secreted the privileged documents away in a file folder, removed them from the hearing room, photocopied them and then attempted to use them to extort a "shotgun" settlement (including threats to "go to the press"). (323a-325a). The state court determined that even after being ordered to relinquish possession of the documents and all copies thereof to her counsel, who was to secure them in a locked vault, petitioner retained possession of the documents, studied them and took and retained copious notes from them. Thereafter, petitioner placed the privileged documents in a cabinet to which she had unrestricted access as a paralegal employed in her own counsel's office. (325a).

The state trial court dismissed petitioner's state court suit, concluding:

> [T]he actions of the plaintiff and her attorney were so egregious in taking this material that was clearly the attorney's work product, clearly interviews with the defendant's employees, clearly not for perusal by any other attorney or litigant in this litigation, so heinous that the only remedy, as much as I dislike to do this, is to dismiss the lawsuit. Otherwise, there is no meaning to privilege, there is no meaning to conduct among attorneys, and there is no rule of law.
>
> Whatever was in these papers was confidential. That confidentiality was broken. It was repeatedly

> broken by both the litigant and the attorney, and cannot be countenanced by the Court.
>
> Therefore, I am dismissing the lawsuit in its entirety. (311a).

The New York Court of Appeals determined that the trial court's order dismissing petitioner's action was within its discretion to enter "an appropriate order" pursuant to CPLR § 3103(c)[3] to remedy the taint injected into the state court action. The New York Court of Appeals observed that the extreme measure of dismissal — "likely the severest remedy that may be visited upon a plaintiff" — was warranted under the circumstances of the case. (331a, 332a). The court recognized that after studying, retaining, photocopying and handcopying the privileged documents, "[p]laintiff's knowledge of course can never be purged." (332a).

B. The Dismissal of Petitioner's Federal Court Actions

Following the state trial court's January 9, 1992 dismissal of her state court action, on June 17, 1992, petitioner commenced *Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer and Jesse D. Wolff*, 92 Civ. 4455 (LBS) ("*Lipin II*") in the United States District Court for Southern District of New York. In *Lipin II*, petitioner alleged the identical claims set forth in *Lipin I* and certain transactionally related claims against the individual and Red Cross defendants as well as the counsel who represented them in *Lipin I*. Petitioner included in her complaint in *Lipin II* references to the information contained in the privileged documents and, indeed, expressly incorporated their contents by reference in her

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3. CPLR § 3103(c) is reproduced at 369a.

complaint, despite a state court order prohibiting her from making use of the documents or information contained in them. Based on petitioner's violation of the state court's order, defendants in *Lipin II* obtained a stay from the District Court in order to seek relief in the state court.

Ultimately, after numerous unsuccessful attempts by petitioner to lift the stay in the District Court and the Second Circuit and several recusal motions in the state and federal courts, the District Court continued the stay in *Lipin II* until petitioner's appeals of the state court's dismissal were determined. In the interim, on March 5, 1993, the day after the District Court denied petitioner's last motion to vacate the stay in *Lipin II*, petitioner commenced yet another action in the District Court, *Lipin v. American Red Cross in Greater New York, American National Red Cross, Robert M. Bender, Jr., James T. Byrne, Jr., Carl Desch and Barbara Fletcher*, 93 Civ. 1334 (LBS), ("*Lipin III*"), again alleging various claims which were either identical or transactionally related to those previously dismissed in *Lipin I*. The District Court stayed *Lipin III* on the same basis as *Lipin II* had been stayed. (5a-6a, 35a-36a).

Following the New York Court of Appeals' affirmance of the dismissal order in *Lipin I*, respondents moved to dismiss *Lipin II* and *Lipin III* on the grounds that the disposition of *Lipin I* barred *Lipin II* and *Lipin III*. (6a). The District Court granted respondents' motion to dismiss *Lipin II* and *Lipin III* based upon grounds of claim preclusion. 1996 WL 18901 (S.D. N.Y. January 17, 1996) (28a-50a). The United States Court of Appeals for the Second Circuit initially affirmed the District Court's determination in a Summary Order issued on December 12, 1996, based upon grounds of both claim preclusion and issue preclusion. 104 F.3d 355 (2d Cir. 1996) (unpublished table decision) (20a-27a). Later, the Second Circuit vacated its December 12, 1996 Summary Order and issued a Corrected

Summary Order on May 22, 1997, affirming the District Court's determination on grounds of claim preclusion alone. 113 F.3d 1229 (2d Cir. 1997) (unpublished table decision) (1a-18a).

REASONS FOR DENYING THE WRIT

Petitioner makes no effort to address the considerations governing review on certiorari set forth in Rule 10 of the Rules of this Court. Moreover, the Petition fails to establish any compelling reason for granting a Writ of Certiorari — it identifies neither a conflict among appellate courts on an important issue nor an important but unsettled question of federal law.

The decision of the Second Circuit is not in conflict with the decision of another United States Court of Appeals or a state court of last resort. The Petition attempts to create a purported conflict between the Second Circuit's decision in this case and the Fourth Circuit's decision in *United States v. Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. 1993). (Pet. at 13). *Shaffer* directly involved the fact-based question of whether dismissal was an appropriate remedy, under the federal courts' inherent power, for the harm caused by attorney misconduct. In *Lipin I*, the New York Court of Appeals was faced with the question of whether dismissal was an appropriate remedy, under governing New York law, for the prejudice resulting from the egregious and heinous misconduct of petitioner. Petitioner chose not to request review by this Court of the New York Court of Appeals' determination in *Lipin I*, and the issue of the propriety of the state court's dismissal under governing state law was not before the Second Circuit in *Lipin II* and *Lipin III*. (8a-9a). There is, therefore, no "conflict" because the Second Circuit and the Fourth Circuit were deciding different issues.

Nor does the Petition identify any important question of federal law that has not been, but should be settled by this Court. The Second Circuit simply applied New York's claim preclusion law as did the District Court. As this Court ruled long ago, the preclusive effect of a state court judgment on a subsequent action brought in federal court is to be determined in accordance with state law. *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 81 (1984); *See also* 28 U.S.C. § 1738 (implementing full faith and credit clause, U.S. Const. Art. IV, § 1).[4]

The Second Circuit observed that the New York courts directly addressed the preclusive effect of the dismissal of *Lipin I* in the context of a dispute raised by petitioner as to whether the January 9, 1992 state court dismissal order had been with prejudice. In that context, the New York courts observed that "[t]o allow [petitioner] to commence a new action would be to circumvent the clear intent of the prior order." *Lipin v. Bender*, 216 A.D. 2d 131, 629 N.Y.S. 2d 3, 3 (N.Y. App. Div. 1995), *leave to appeal dismissed in part, denied in part*, 88 N.Y. 2d 866, 667 N.E. 2d 335, 644 N.Y.S. 2d 685 (1996) (16a).[5] Applying New York's transactional approach to claim preclusion,[6] the Second Circuit analyzed the claims alleged in

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4. 28 U.S.C. § 1738 is reproduced at 362a.

5. Petitioner mischaracterizes the state court's dismissal as a "penalty dismissal", despite the fact that the New York Court of Appeals characterized the dismissal as a necessary "remedy" in light of the extreme prejudice caused by petitioner's persistent and egregious misconduct. (331a-332a). Regardless of the label ("penalty" or "remedy"), the only relevant question is the one addressed and answered affirmatively by the Second Circuit — *i.e.*, whether the state court would give preclusive effect to the dismissal order. (11a-16a).

6. "[O]nce a claim is brought to a final conclusion, all other claims (Cont'd)

both *Lipin II* and *Lipin III* and compared them with those which were alleged or could have been alleged in *Lipin I*, concluding that they were *all* barred by the state court's dismissal in *Lipin I*.

The instant Petition does not actually seek review of the Second Circuit's decision. Rather, it seeks review of the underlying decisions of the New York State courts. The issues which petitioner attempts to raise for review by this Court — such as the scope of the attorney-client privilege and alleged misconduct by the defendants and their counsel — were all matters which were extensively litigated in numerous proceedings and appeals and conclusively settled by the New York State courts.[7] Petitioner, having failed to seek a Writ of Certiorari from this Court to review the New York Court of Appeals' affirmance of the state trial court's dismissal of her

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(Cont'd)
arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y. 2d 353, 357, 429 N.E. 2d 1158, 1159, 445 N.Y.S. 2d 687, 688 (1981). Claims which were actually alleged as well as those transactionally related claims which could have been alleged are precluded. *See Smith v. Russell Sage College*, 54 N.Y. 2d 185, 194, 429 N.E. 2d 746, 750, 445 N.Y.S. 2d 68, 72 (1981), *reargument denied*, 55 N.Y. 2d 878, 433 N.E. 2d 537, 448 N.Y.S. 2d 1026 (1982).

7. Petitioner's due process challenge to the decision below is in reality a belated attempt to obtain indirect review of the state court proceedings which resulted in the dismissal of her action. It is without any foundation in the law. It is well-established that a court's dismissal of a case at the pre-trial stage for an appropriate reason does not implicate any violation of constitutional rights. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (holding that dismissal due to discovery abuse was proper); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-354 (1909) (finding no due process violation where case was dismissed for failure to obey discovery order).

original state court action, has waived her opportunity to seek such review. The Second Circuit's decision — which was simply a straightforward application of New York's settled claim preclusion law — does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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(3)

No. 97-674

Supreme Court, U.S.
FILED
DEC 1 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOAN CAROL LIPIN,

Petitioner,

—v.—

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, JESSE D. WOLFF, JAMES T. BYRNE, JR., CARL DESCH and BARBARA E. FLETCHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. CERTIORARI IS NEEDED TO PRESERVE DUE PROCESS AND EQUAL PROTECTION RIGHTS IN CONSIDERATION OF MOTIONS TO DISMISS

Respondents' brief in opposition to the petition for a writ of certiorari misleads by contending that the Second Circuit's two conflicting non-publishable decisions constituted "simply" a so-called "straightforward" application of New York's "settled" claim preclusion law. (Brief, p. 8)

Each of the quoted words in the foregoing from the brief is hyperbole and exaggeration that is "simply" wrong, as is the further contention that the petitioner's claims involving "the scope of the attorney client privilege and alleged misconduct by the defendants and their counsel" were "extensively litigated and conclusively settled. . . ." (Br. p. 7)

In fact nothing was ever "litigated" at all, in any meaningful sense of the word, and therein is centered the basis for the petition herein.

Missed entirely in respondents' brief is the issue regarding a federal right that has been obstructed in its application by virtue of federal privilege rules not recognized in a state court.

Unless review of the issues raised in the petition for a writ of certiorari is granted, potential plaintiffs will be dissuaded from resorting to state courts for the assertion of employment cases involving federal civil rights claims because of the jeopardy in which they may be placed by the non-application of federal privilege law contrary to Rule 501 of the Federal Rules of Evidence.

Respondents' assertion that the petition "does not identify any important question of federal law that has not been, but should be settled by this Court," and "makes no effort" to address considerations governing review on certiorari set forth in this Court's Rule 10 (Br. pp. 5, 6) is an example of

rhetorical excessiveness that assumes either (a) that the petition will not be read, or (b) disregard of the fallacy that the obvious uncertainty in the waffling of the Second Circuit in its affirmance of the dismissal of petitioner's two actions with multiple claims on the basis of two conflicting non-publishable opinions clearly negate respondents' assertion that "simply a straightforward application of New York's claim preclusion law" (Br. p. 8) was all that was involved, or (c) disregard of the extreme superficiality of the treatment below on a motion to dismiss will be of no concern to this Court in its supervisory role in the administration of justice, contrary to Rule 10.

It is submitted that an interpretation of state legislation regulating discovery to preclude prosecution of far different and distinct claims subsequently pleaded in federal court, as described in the petition herein, fits into the classic definition of a bill of attainder as an act that may affect the life of an individual, or may confiscate her property, or may do both, as here, that the Constitution prohibits to both state and federal governments (Art. I §§ 9, 10) who are deprived of rights without any of the forms or safeguards of trial, or without consideration of the sufficiency of the proof produced, whether conformable to the rules of evidence or not, or that fixes the degree of punishment in accordance with its own notions of the enormity of the offense. See Cummings v. Missouri, 71 U.S. 277, 323 (1867); Fletcher v. Peck, 10 U.S. 87, 138 (1810).

The result is the antithesis of justice rather than its embodiment; the very documents that caused petitioner's litigation to be consigned to a jurisprudential black hole of irretrievability themselves constitute the best evidence of the unconstitutional infringement of her civil rights.

The misleading nature of the answering brief is shown by the fact that a controlling federal statute governing one of petitioner's most important claims, 42 U.S.C. § 1986, cited

seven times in the petition (pp. 2, 5, 10, 11, 15, 16, 21), is not referred to even once by respondents.

Conversely, unlike Migra v. Warren, 465 U.S. 75 (1984), on which respondents do rely (Br. p. 6), the instant case involves claims that could not have been pleaded in the state action because they did not accrue until the documents containing evidence of such unlawful conduct were placed in the plain view of petitioner. (Pet. p. 15)

Thus, unless the petition is granted, petitioner's claims thereunder will be extinguished without a hearing on the merits ever having been afforded, a drastic difference from the situation in Migra, supra, in which the plaintiff in fact had been awarded reinstatement and compensatory damages in the state court action instead of having it dismissed out from under her without any consideration of the merits having been ever afforded. (465 U.S. at 80.)

II. RESPONDENTS' CASES SUPPORT PETITIONER

Similarly inapposite are the cases relied upon by respondents in connection with their assertion that the pre-trial dismissal of litigation does not "implicate" a violation of any constitutional rights. (Br. p. 7, fn. 7)

On the contrary, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350 (1909), holds is that due process is not implicated only when the dismissal is due to "a failure by the defendant to produce what we must assume was material evidence in its possession," a very different situation from one in which the documents produced, through carelessness or worse, themselves are evidence of respondents' responsibility for unlawful conduct.

Carefully distinguishing from a penalty dismissal such as is involved here, the Court stated that "the generating source of the power was the right to create a presumption following from the failure to produce." (212 U.S. at 351; emphasis added.)

The difference between that case and this is put into sharp focus by the following statement in Hammond Packing Co. (212 U.S. at 351):

> "The difference between mere punishment, as illustrated by Hovey v. Elliott, [167 U.S. 409 (1897)] and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other." (Emphasis added.)

III. INDICATIONS OF JUDICIAL DISFAVOR TOWARD SEXUAL HARASSMENT CASES CONFIRMS THE IMPORTANCE OF SUPERVISORY REVIEW

The superficial treatment of the sexual harassment claims of petitioner by the courts below warrant review because of the importance of such issues under Rule 10 in exercise of the Court's supervisory power.

The non-recognition of the disputed fact issues presented in determining a motion to dismiss in favor of respondents is indicative of the general disfavor of such litigation that has

been reported to exist in the federal judicial system. See Garland, "Courts Behaving Badly -- Task forces say some judges impatient with job bias cases," ABA Journal, November 1997, p. 30. The Garland article singles out the Second Circuit for the following comment (id.):

> "Judges' beliefs that employment discrimination is too trivial for their attention, the 2nd Circuit task force wrote, could 'easily translate into actual unfairness to a litigant.' Indeed, several appellate court opinions hint that District Court judges showed 'stereotyped thinking about the seriousness or the reality of sexual harassment claims,' the task force wrote."

Pertinent portions of the Second Circuit's Task Force draft report on "Gender, Racial, and Ethical Fairness in the Courts" dated June 5, 1997, are set forth in the Appendix.[1]

As stated in the Second Circuit Task Force Preliminary Draft Report on Gender, Racial, and Ethnic Fairness in the Courts dated June 10, 1997, pp. 88-89 (376a-377a):

> ". . . the Committees received many comments from lawyers indicating their view that employment discrimination cases are disfavored by judges. Disfavor of sexual harassment litigation, in particular, accounted for many of the specific complaints and comments that were received." (Footnote omitted; emphasis added.)

Appendix A to the Task Force's Preliminary Draft Report

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[1] Citations 375-399 followed by the suffix "a" refer to the Appendix annexed hereto.

provides detailed information concerning the institutional bias afflicting sexual harassment claims in the Second Circuit. (380a-399a)

Among the surprising data presented are the statistics showing that the reversal rates in employment litigation in the Second Circuit in 1995 and 1996 are less than half the reversal rates experienced in all civil litigation, and far below the reversal rates experienced nationally in employment litigation. (389a) The Task Force also noted the disturbing fact that the reversal rates in employment litigation in the Second Circuit have shifted "quite dramatically" in recent years, and that the Second Circuit is now inexplicably reversing "a much smaller percentage of employment cases when compared to civil cases generally." (388a-389a)

The Task Force focused on indications of "a variety of disturbing stories" that surfaced in hearings and in focus groups concerning sexual harassment cases. (390a-392a)

In addition, the Task Force also considered the treatment received by sexual harassment cases in the Second Circuit from 1990 through 1996. (392a-394a) Based upon the data derived from computerized research, it found that fully half of the cases had been disposed of either on a motion to dismiss (as here) or on a summary judgment, a result it found to be "somewhat surprising" since such cases are generally agreed "to involve a high level of factual complexity" (also as here). (394a)

The Task Force also found that the defendants prevailed in 66.6% of the cases at the trial court level, and in fully 91.6% of those decided on dispositive motions. (394a)

However, "Where the cases went to trial, plaintiffs won in seven and lost in five; but consistent with other reports, plaintiffs did markedly better before a jury than a judge."

(394a; footnote omitted.)

The Task Force also stated that it found evidence of "an unsympathetic and dismissive attitude toward the legitimacy of their claim on the courts' time and attention," and that such attitudes "sometimes do taint the proceedings" as a result of both "impatience" as well as "stereotyped thinking on the part of the judges about the seriousness or the reality of the sexual harassment." (396a-397a)

The conclusion of the Second Circuit Task Force's Preliminary Draft Report (Appendix A; 380a) is that a judge's belief that a case "is too trivial for his or her attention can easily transmute itself into actual unfairness to a litigant - in this instance, a result that disproportionately disadvantages both women and members of minority groups; this is a problem that deserves attention." (399a)

Petitioner therefore respectfully submits that the problems raised herein similarly "deserve attention." Due process is at least as "due" in a case involving penalty dismissal of sexual harassment and denial of equal protection claims that should not have been accorded preclusive effect by federal courts on a motion to dismiss.

A clear conflict with state law under which the discovery of such evidence that caused the dismissal of the state litigation was considered to be "heinous," the principal contention relied upon in respondents' brief (Br. pp. 1-5), is clearly presented. Under federal law, it is "heinous" instead to suppress evidence directly probative of petitioner's claims, particularly when insufficient precautions were taken by respondents to preserve its confidentiality. In re Horowitz, 482 F.2d 72, 80-82 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

Respondents' contention that petitioner should have sought

certiorari for such a decision centered upon state procedural law (Br. p. 7), when a separate claim based on 42 U.S.C. § 1986 was directly made available to petitioner as a matter of federal law, as to subsequent acts that were not and could not have been asserted in the state litigation, misses the point entirely.

Under 42 U.S.C. § 1986, an affirmative duty is imposed upon "One who knows of and has the ability to aid in preventing a § 1985 conspiracy . . . to do so." Wahad v. Federal Bureau of Investigation, 813 F. Supp. 224, 232 (S.D.N.Y. 1993).

The underlying purpose of Section 1986 is for "every person" with evidence of the existence of such a conspiracy to violate civil rights to come forward with such evidence so that it may be used in order "to prevent or aid in preventing the commission of the same . . .," and a cause of action for damages to be "recovered in an action on the case" is explicitly granted for that purpose. (42 U.S.C. § 1986.)

Together, Sections 1985 and 1986 are a clear expression of the overriding federal interest in the exposure of conspiracies to deprive individuals of their civil rights so that the infliction of further injury may be prevented.

The courts below failed to consider that no state procedural rule may be used to negate or override the federal mandate of Sections 1985 and 1986.

The Constitution prohibits what the courts below permitted -- interference with the prosecution of federal civil rights guarantees applicable to sexual harassment claims on the basis of the penalty dismissal of a state action for infraction of state discovery rules inconsistent with federal privilege rules, thus giving rise to a "clear collision" between state and federal law.

Hamm v. City of Rock Hill, 379 U.S. 306, 311-12 (1964), indicates that the civil rights laws prohibit

> ". . . the application of state laws in a way that would deprive any person of the rights granted under the Act. The Supremacy Clause, Art. VI, cl. 2, requires this result where 'there is a clear collision' between state and federal law, Kesler v. Department of Safety, 369 U.S. 153, 172 (1962), or a conflict between federal law and the application of an otherwise valid state enactment, Hill v. Florida, 325 U.S. 538 (1945)."

This Court has made it clear that factual determinations of a kind never undertaken in this litigation are required to determine whether such communications were or were not of such a nature to be accorded privileged status. See Upjohn Co. v. United States, 449 U.S. 389, 394-6 (1981).

In addition, the principle that factual determinations of a kind never made here as to whether a claim of confidentiality was waived by careless handling is firmly embedded in federal law. See Eigenheim Bank v. Halperin, 598 F. Supp. 988, 991 (S.D.N.Y. 1986); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464-5 (E.D. Mich. 1954).

The existence of a sustained and deliberate campaign to deprive petitioner of her federally guaranteed right to a remedy for the infliction of repeated outrages in the form of sexual harassment and denial of equal protection is alleged in the first federal action. Such outrages are all the more odious because they were perpetrated under the cognizance of the Red Cross by a chief executive officer who is alleged to have administered the agency more in the nature of his own private harem rather than as an instrumentality of the federal government.

Petitioner's actions were required by and protected under the federal civil rights laws, and the exercise of her duties accordingly were in the true best interests of the Red Cross. Under federal law, there can be no doubt that petitioner was legally and ethically bound to seek to stop respondent Bender and the other co-conspirators from violating the civil rights of herself and others similarly situated.

The very documents that respondents have suppressed themselves reveal the public interest involved in such a remedy. The constitutional and statutory purposes of 42 U.S.C. §§ 1985 and 1986 therefore will be confounded unless this Court grants the petition herein.

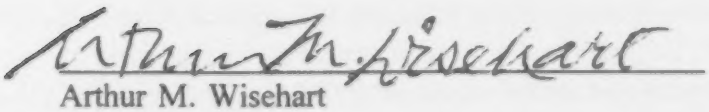
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

December 1, 1997

Respectfully submitted,

WISEHART & KOCH



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APPENDIX

PRELIMINARY DRAFT REPORT OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS

June 10, 1997

Hon. Sharon E. Grubin
Co-Chair

Hon. John M. Walker, Jr.
Co-Chair

Hon. John T. Curtin
Hon. Sterling Johnson, Jr.
Hon. Constance Baker Motley
Hon. Sonia Sotomayor
Ellen Mercer Fallon, Esq.
Fern Schair, Esq.
Sue Ann Shay, S.D.N., Esq.

Members

C. Employment Discrimination Litigants

As we have stated, a study of case outcomes is not included in this report. However, we note here that some aspects of the Committee Report concerning treatment of litigants in employment discrimination cases are not dependent on case outcomes.

During the course of the Committees' study, some preliminary indicators of less than fair treatment of litigants in employment discrimination cases surfaced. First, the Committees received many comments from lawyers indicating their view that employment discrimination cases are disfavored by judges. Disfavor of sexual harassment litigation, in

[89]

particular, accounted for many of the specific complaints and comments that were received.[81] At hearings and in focus groups various disturbing stories were related. In rare instances, openly discriminatory statements by the trial judge were reported. One judge was alleged to have said in open court that a plaintiff's sexual harassment claim was not serious because her employer only stared at her breasts, rather than touching them, and "most women like that." In another, a judge was alleged to have inappropriately conveyed through his facial expressions and words utter skepticism about the validity of the

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[81] Not every sexual harassment claim is made in the employment context, however. Some, for example, have also come from prisoners accusing guards of harassing them or from students in academic institutions.

plaintiff's claim. Staff, too, can convey an attitude of ridicule or disbelief. One focus group participant complained of an instance where a court reporter visibly and repeatedly rolled his eyes while witnesses testified about the emotional distress suffered by a victim of sexual harassment.

Second, some judges surveyed expressed their belief that the proliferation of small cases involving individual claimants, including employment discrimination cases, clog the federal courts and divert the attention of judges away from larger, more significant civil cases.[82] Others expressed concern that rapidly growing caseloads, due in part to increasing employment litigation, will require an increased number of judges, destroying the collegiality

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and cohesiveness of the federal bench.[83]

Finally, in the Committees' view, several appellate opinions hint that some trial judges have exhibited impatience

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[82] It is true that these cases draw heavily on the time of the judiciary. From 1970 to 1989, the number of employment discrimination cases filed in federal courts increased by 2166%, as compared with a 125% increase in the overall civil caseload. Today, employment discrimination matters account for about 10% of the total caseload in the Southern District of New York.

[83] The recently issued Long Range Plan for the Federal Courts, for example, recommended that much of the litigation by individuals be diverted to state courts or be handled to a greater extent by administrative agencies, including litigation involving "economic or personnel relations or personal liability arising in the workforce."

with employment discrimination claims, as well as stereotyped thinking about the seriousness or the reality of sexual harassment claims. In one instance, a district court judge expressed considerable skepticism that a sexually harassed woman who got promotions and pay raises during the period in which her supervisor demanded sexual favors could nevertheless have suffered legally cognizable emotional injuries. In another instance, a district court's handling of a case suggested a belief on the judge's part that the plaintiff's consumption of alcohol at a business dinner, rather than the misconduct of her fellow employees, was the proximate cause of her rape. And in another case, the judge made known his impatience with a sexual harassment claim by unexpectedly awarding summary judgment to the defendants on the merits -- a ruling requested by neither side -- despite the fact that neither plaintiff nor defendant had yet addressed in detail any issue in the litigation except for jurisdictional questions.

These preliminary indications in the Committees' study raise a concern that, when an employment discrimination case is properly before a federal court, a judge's belief that the matter is too trivial for his or her attention may too easily translate into actual unfairness to a litigant as the case proceeds through the system in a form that disproportionately

[91]

disadvantages both women and members of minority groups. Whether this concern will prove to be well founded must await further study elsewhere. However, whatever the reasons underlying the reported dislike by judges of employment discrimination cases, it is important for judges to assure that these cases are not treated with less than the uniform seriousness and respect that litigants deserve. As Judge Edward Weinfeld used to so aptly remark: no case is less important to the litigants involved than another. Furthermore, all judges

should be careful to avoid any remarks or visible reactions that, even if innocently intended, might understandably be perceived by litigants as reflecting biased treatment.

Conclusions:

From the data discussed in Chapter Seven, we reach the following conclusions:

a. While the circuit's interpretation services are generally excellent given the array of languages for which interpretation is sought and the frequency with which interpretation is required, some language requirements, particularly in lesser populated areas, are not being met.

b. The availability and adequacy of interpretation services in civil cases initiated by private parties need study.

c. Assistance to pro se litigants, while adequately serving the needs of these litigants in general, varies in kind and degree among the courts within the circuit, and a better exchange of information between courts is needed.

d. The Committees have reported receiving information, largely from lawyers, to the effect that some judges disfavor employment discrimination cases and therefore might be treating litigants in those cases less than evenhandedly. We view the existence of such a concern as worrisome.

APPENDIX A to the Preliminary Draft
Report of the Second Circuit Task Force
on Gender, Racial, and Ethnic Fairness
in the Courts

DRAFT REPORT OF THE WORKING COMMITTEES TO THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS

Gender Committee
John H. Doyle, Co-Chair
Bettina B. Plevan,
Co-Chair

Diane L. Zimmerman,
Reporter

Racial and Ethnic Committee
William J. Snipes, Co-Chair
HectorWillems Rodriquez,
Co-Chair

Beryl Jones,
Reporter

Sheila L. Birnbaum, Executive Director
Carroll Seron, Social Science Advisor

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Sharon Arnoldi
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Amy D. Hundert

Draft: June 5, 1997

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VII: The Litigants

EMPLOYMENT DISCRIMINATION

An area of litigation that generated a large number of spontaneous complaints and concerns was employment discrimination - a category in which minorities and women make up a high percentage of the litigants. Although various specific problems surfaced in focus groups and other settings, the common refrain that summed them up was that judges "don't like" these cases. One attorney reported that a federal judge referred (rather pungently) to her role as legal counsel in discrimination cases as "skunk work." When judges and attorneys, including those otherwise

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enthusiastic in their praise for the generally high standards of fairness observed in federal courts, were queried about the accuracy of the assertion that employment cases are disfavored, many agreed with the proposition. One white male lawyer who does not himself practice employment discrimination law, summed up the problem as follows: "You constantly hear judges say that there are whole categories of cases that don't belong in federal courts....I think if you polled judges, you would find that they think discrimination claims are the most dubious of the cases that actually go to trial. It surely seems that federal judges don't like them, and I wonder how this affects the perception that potential litigants have of the fairness of the courts."

Because of the frequency of such comments, and the fact that the both the Ninth Circuit gender and the District of Columbia Circuit race and gender studies identified employment

discrimination cases as a significantly problematic area, the Committees took a variety of approaches to investigating the question of fairness to litigants in these cases. Two focus groups made up of attorneys representing both plaintiffs and employers were conducted to get the sense of those most familiar with these cases. Questions about the treatment of employment discrimination cases were asked during interviews with a sampling of judges; an attempt also was made to inquire into the attitudes of judges through the judicial questionnaire. Preliminary examinations of empirical data were made to look for any available clues about the possibility that the "dislike" was real and that it might translate somehow into unfairness in the handling of the cases. It is important to stress what is meant by fairness in this context. We do not mean the fairness of rules of substantive law applied by the courts of the Second Circuit. Rather, we mean to ask if, within the confines of applicable law,

[182]

these cases receive evenhanded and unbiased hearings on a level comparable to, for example, a contracts or a securities or an intellectual property case.

We start by noting that, to the extent that judges in fact do dislike employment discrimination cases - a proposition we could not explore directly[256] or comprehensively - a variety

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[256] The Committees initially proposed asking judges to indicate which of a wide range of types of cases they preferred not to handle. Among the categories, employment discrimination was to be listed. Because objections were raised by members of the court on the grounds that the question might be suggestive, the questionnaire was instead changed to ask judges whether certain categories of cases ought not to be handled in federal courts and if so, which ones. About 30%

of explanations can be posited. Some judges attribute the unhappiness with the cases to the fact that plaintiffs in them often appear pro se, and do not understand the law or the court's procedures. Many federal judges also appear to believe that the proliferation of small cases involving individual claimants clog up the federal courts and divert the attention of judges away from larger, purportedly more significant civil cases. Others express concern that rapidly growing caseloads demand larger and larger numbers of judges and destroy the collegiality and cohesiveness of the federal bench. The recently issued Long Range Plan for the Federal Courts, for example, recommended that much of the litigation by individuals be diverted to state courts or be handled to a greater extent by administrative agencies. This recommendation obviously would affect more than employment litigation. However, it is also true that prominent among the recommendations in the report was a specific one that cases involving "economic or personnel relations or personal liability arising in the workforce" be among those largely eliminated from federal litigation.[257]

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Some insight into other reasons for the apparent negativity of some judges toward employment discrimination cases can be gained from an article that appeared three years ago in a New

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responded that there were such cases but only 13 judges actually identified what they were, a number too small to yield meaningful information.

[257] Another target of the report was diversity cases, again often involving individual claimants in tort suits. Interestingly, these are another category of federal cases in which minorities and women are also believed to be more heavily clustered.

York newspaper. The author, a former federal judge, complained that discrimination cases are an unjustifiable consumer of judicial time because they are:

> rarely settled, are characterized by high levels of acrimony and subjective claims of victimization; they are immensely time consuming and are controlled by legal standards that, lacking sufficient precision, are overgeneralized and of marginal use.

Other judges privately agreed that this article captured the views of colleagues who thought the cases too resistant to settlement and too "small potatoes." Others, however, characterized the problem a bit differently, pointing out that, in their experience, the strongest cases do settle, leaving the least meritorious claims for trial.

Certainly, the claim that these cases draw heavily on the time of the judiciary is not exaggerated. From 1970 to 1989, the numbers of such cases filed in federal courts increased by 2,166%, as compared with a 125% increase in the overall civil case load.[258] This increase has been explained by a number of factors, including the broadening of protected classes, the dips in the health of the overall economy, the increase of women in the workforce, and the increased expectations on that part of younger workers that they will be treated fairly.[259] Today, as noted earlier in this Report, about 10% of the total caseload in the Southern District of New York, is made up of

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[258] J. Donohue & P. Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 985 (1995) [hereinafter Changing Nature].

[259] Id. at 990-99.

employment cases.[260]

[184]

However, the concerns that emerged were not only related to judicial efficiency. One judge reported that colleagues criticize the employment discrimination area as "highly emotional," and speculated that highly emotional might well be a code phrase for "female." Whether the gender (or the race) of the litigant in itself plays a direct role for some judges in how they think about these cases - remembering, of course, that white men bring a substantial number of age discrimination

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[260] Employers share the concern about the numbers of employment discrimination cases, and have turned in substantial numbers in recent years to requiring new employees to agree that any discrimination claims will be handled by binding arbitration. Because of serious uncertainty about the reviewability of decisions by arbitrators, even in situations where the arbitration result is a deprivation of the benefits of federal law or where the outcome itself seems infected by racial, ethnic or gender stereotyping, these agreements are a matter of considerable concern. At least one such case has come before the Second Circuit; in that case, an arbitrator reinstated an employee who had been fired for sexually harassing a colleague. The district court found public policy to be a justification for reviewing the arbitration decision, and the Second Circuit affirmed. Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO, 915 F.2d 840 (2d Cir. 1990), cert. denied, 499 U.S. 922 (1991). A full examination of the relationship between mandatory arbitration and the problems discussed in this report was not undertaken. For an excellent discussion of the problems with arbitration of employment discrimination cases, see Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997).

cases - there is reason to suspect that the changing nature of employment discrimination claims could play a role in shaping negative judicial attitudes.

In the early years of Title VII, when litigation focused on employers who refused to hire women or minorities for certain jobs (or altogether) the issues were considerably more clear-cut and the inequities more apparent. Today, however, factually more complex claims make up the bulk of the litigation: suits over firings and lay-offs, failure to promote or sexual harassment.[261] Some evidence exists that these sorts of claims may be greeted more skeptically by judges than are failure to hire cases. In fact, judges would seem to be more doubtful about them than are lay jurors.

[185]

According to one recently reported statistic, plaintiffs in employment discrimination cases are almost twice as likely to win before a jury as they are in a bench trial.[262]

Although this disparity is subject to many interpretations, at least one plausible explanation is that judges, removed as they are from contact with the day-to-day operation of the business world, are less sympathetic than are jurors to the complexities

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[261] The study by Donohue and Siegelman, for example, showed that, whereas in the late 1960's, hiring cases greatly outnumbered firing cases, by the late 1980's firing cases outnumbered hiring cases by six to one. Changing Nature, supra, note 258, at 1015.

[262] Allen Myerson, As Federal Bias Cases Drop, Workers Take Up The Fight, N.Y. Times, Jan. 12, 1997, at A1, 14.

of current workplace relationships. Another explanation sometimes offered is that the women and minorities who make many of these claims come across to judges as less credible witnesses than do white men testifying in commercial cases.[263] Lynn Hecht Schafran relates a story about how credibility can be mis-evaluated that demonstrates the possible problem. She tells of a male attorney who almost turned down what turned out to be an important employment discrimination case because, at first hearing, he wrongly interpreted the client's intense psychic distress at the outrageous treatment to which she had been subjected as evidence of hysteria or mental illness.[264]

All of these considerations, collectively, suggest that it would be worthwhile to consider whether employment discrimination litigants receive equitable treatment in the courts of the Second Circuit. The Committees hope that it will be possible in the future to undertake more empirical studies to help clarify some of the questions raised in this Report. One useful avenue for research

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[263] Credibility problems for women as compared with white men have been recognized in a number of settings. See, e.g., Reiko Hasuike, Credibility and Gender in the Courtroom, in The Woman Advocate: Excelling in the 90's (1995); Note Gender and the Role of Expert Witnesses in the Federal Courts, 83 Geo. L. J. 635 (1994); Lynn Hecht Schafran, Credibility in the Courts: Why is There a Gender Gap? The Judges' Journal 5 (Winter 1995).

[264] Lynn Hecht Schafran, Is the Law Male?: Let Me Count the Ways, 69 Chi.-Kent L. Rev. 397, 404-05 (1993).

would be to compare the relative generosity of judges in making fee awards in employment cases as compared with fee awards in otherwise comparable nondiscrimination cases. We were not able to do this study within the time available to us; we did, however, look at two other rough measures - overall reversal rates and the disposition of post-verdict motions in jury trials.

Although overall reversal rates in employment cases are not deeply informative - statistics alone do not indicate, for example, who was favored by the reversal or the circumstances that prompted it - the numbers could give some indication of whether trial court determinations in these cases are any more or less likely to be error-prone than determinations in civil cases generally. As it turns out, the picture we found is complex and puzzling.

Overall, the Second Circuit is less likely than the average Court of Appeals to reverse any civil case appealed to it, including an employment discrimination case.[265] But the relationship in the circuit between rates of civil reversal generally and rates of reversal in employment cases specifically has shifted quite dramatically over recent years. In the early

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[265] Looking at the period from 1990 through 1996, the percent of decisions in all civil cases reversed on appeal in the federal courts nationwide was 12%; in the Second Circuit, the comparable figure was 9.8%. Nationally, federal appellate courts reversed 11.2% of employment cases on the merits, whereas the rate for the seven years at issue in the Second Circuit was just under 10%. Source: Administrative Office of the U.S. Courts.

1990s, the court was markedly more likely to reverse in employment cases than in civil cases generally, whereas, over the last three years, the circuit has reversed a much smaller percentage of employment cases when compared to civil cases generally.

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TABLE 25: Reversal Rates in All Civil and in Employment Appeals

Court and Type of Case	1996	1995	1994	1993	1992	1991	1990
2d Circuit - All Civil Appeals	7.4%	8.9%	10.9%	10.7%	11.4%	8.9%	11.3%
2d Circuit - Employment	3.7%	2.9%	7.3%	13.9%	14.5%	20.5%	13.3%
National - All Civil Appeals	10.6%	10.8%	12.1%	11.3%	12.9%	13.4%	13.7%
National - Employment	9.8%	10.5%	10.1%	11.1%	11.3%	13.3%	13.2%

As the above Table 25 demonstrates, the shifting pattern of reversals in the Second Circuit varies markedly from the national pattern in which the relationship between the two categories remained fairly constant. Further study is needed to understand why the shift that can be seen in the Second Circuit has taken place. One hypothesis would be that trial court judges in the circuit have simply become better in recent years than district court judges nationwide at handling these cases.

The second indicator examined was the disposition of post-verdict motions. Because employment discrimination cases can now be tried to a jury, and because statistical evidence suggests that juries are more favorable to plaintiffs in these cases than are judges, we looked at a sampling of cases to see whether defense motions for a judgment notwithstanding the verdict (j.n.o.v.), for remittitur, or for a new trial fared better in employment than in other types of cases. The Committees' attention was drawn to this subject in part because success on such motions is not routine, and yet we were aware that defendants had prevailed in a number of such motions in recent

years.[266] A computerized search was done, therefore, to identify all reported cases in which a motion for a j.n.o.v., a new trial or remittitur was made during a period of about two-and-a-half years, and the outcomes in employment and non-employment cases were compared. Although there were some disparities in rates of grants and denials, the numbers of employment cases in each category during

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the time period of the study were so small that no conclusions could be drawn.[267] Overall, neither of these preliminary examinations provide clear evidence one way or the other about whether, as a general rule, judges are more harsh or more error-prone in their management of employment cases than they are in other forms of civil litigation. These are areas for potentially useful additional research.

The final area subjected to preliminary examination was that of sexual harassment litigation. The reason for singling out these cases was that they were the ones that, upon analysis, accounted for the bulk of the specific complaints and comments of attorneys (and in some instances, litigants) about employment discrimination cases.[268] At hearings and in focus groups, a

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[266] From 1992 to 1995, we found six such cases that were appealed, five of which were reversed.

[267] It would be worthwhile, however, to redo the study using a longer time frame.

[268] Not every sexual harassment claim is made in the employment context, however. Cases in the Second Circuit have also come from prisoners accusing guards of harassing them or from academic institutions.

variety of disturbing stories were related. In rare instances, blatantly sexist statements by the trial judge were reported. One judge was alleged to have said in open court that a plaintiff's sexual harassment claim was not serious because her employer only stared at her breasts, rather than touching them, and "most women like that." In another case, a judge was alleged to have conveyed through his facial expressions and words his thoroughgoing skepticism about the validity of the plaintiff's claim.[269] Although that plaintiff ultimately won a large judgment, the plaintiff's attorney recalls that the judge "made his views quite clear. It was clear to our client that that was the judge's attitude, and she was furious,

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absolutely furious. She didn't think he had any objectivity whatever."[270] Another lawyer, a defense counsel in

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[269] Staff, too, can convey an attitude of ridicule or disbelief. One focus group participant complained of an instance where a court reporter visibly and repeatedly rolled his eyes while witnesses testified about the emotional distress suffered by a victim of sexual harassment.

[270] Much has been written on the credibility problems experienced by victims of sexual harassment and abuse. See, e.g., Lynn Hecht Schafran, Credibility in the Courts: Why Is There a Gender Gap?, Judges' J. 5 (Winter 1995). A recent California case illustrates the problem. An appellate court set aside the verdict of a trial judge in a sexual harassment case on the ground that the proceedings below were tainted by the judge's dislike of such cases and his unwillingness to treat as credible quite compelling testimony by a plaintiff about her experience. The Court found that the trial judge was animated

employment cases, commented, apparently without irony, that in his experience, judges actually like sexual harassment cases because they find them "entertaining."

A further reason to look at this subset of cases was the fact that the Ninth Circuit gender report had also found sexual harassment litigation to be an especially problematic area. In that report twenty-six cases that generated appellate decisions were found over one five-year period; of these, twenty-three had been won below by the defendant.[271] The Ninth Circuit reversed more than 50% of the defendants' wins in whole or in part. The report also found that about half of all reported sexual harassment cases at the district court level were disposed of either by a motion to dismiss or by granting the defendant's motion for summary judgment.[272]

To compare the situation in the Second Circuit, a

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by gender bias both because he "conveyed the sense [that] he considered sexual harassment cases 'detrimental to everyone concerned' and a misuse of the judicial system" and because his reasons for finding the plaintiff not believable "rests on stereotyped thinking about women and misconceptions of the social and economic realities many women confront." Catchpole v. Brannon, 36 Cal. App. 4th 237, 249, 42 Cal. Rptr. 2d 440, 446, rev. denied, 1995 Cal. LEXIS 5807 (Sept. 14, 1995).

[271] Ninth Circuit Gender Bias Task Force, The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force, 67 S. Cal. L. Rev. 745, 885-86 (1994).

[272] Id. at 886.

computerized search was done on Lexis and Westlaw to identify all decided cases involving claims of sexual harassment that were appealed to the Second Circuit from 1990 through 1996.[273] Twenty-six cases were found. Of these, two were

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omitted from this study because they did not actually address harassment in the claims that led to the appeal.[274] Most of the remaining twenty-four cases that made up the study sample were brought under Title VII of the Civil Rights Act of 1964; but a few invoked Section 1983 or Title IX; not all were

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[273] The search for sexual harassment cases decided since January, 1, 1990, generated 26 published and unpublished opinions in cases directly involving plaintiffs' claims of sexual harassment; several others involved harassment indirectly - for example, suits for damages filed by those accused of harassment - and were omitted from the analysis. Of the remaining cases, one was not brought directly by the alleged victim, but rather by her employer. In that instance, the employer had already tried to fire the person responsible for the harassment; the dismissed employee, however, invoked arbitration under a collective bargaining agreement and was ordered reinstated. The case was filed by the employer to seek judicial review of the arbitrator's decision. Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990).

[274] Of the 26 sexual harassment opinions found, one appeal was dismissed for lack of jurisdiction and one involved a motion to substitute the United States for an individual military officer as the defendant. These were omitted from the analysis on the grounds that they too tangentially touched on the substantive issues of concern here.

employment cases.[275] The findings indicate that sexual harassment litigation has become an increasingly common part of the docket of the Second Circuit; all but six of the opinions analyzed issued since 1994; ten of the most recent twenty were decided in a single year, 1996.

What, if anything, do the appellate opinions show about the treatment of sexual harassment cases in the district courts? First of all, it was interesting to note that half of these cases had been disposed of below on either a motion to dismiss or on summary judgment, a result similar to that reported in the Ninth Circuit, and one that is somewhat surprising, considering that these are cases generally agreed to involve a high level of factual complexity.[276] Overall, the defendant prevailed in 66.6% of the cases at the trial court level, and in fully 91.6% of those decided on dispositive

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motions. Where the cases went to trial, plaintiffs won in seven and lost in five; but consistent with other reports, plaintiffs did markedly better before a jury than a judge.[277]

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[275] One of the 24 cases was a Section 1983 claim by a prisoner, and another was a Title IX action by a student against a school.

[276] Of the 24 cases, 13 were disposed of below by summary judgment or by a motion to dismiss; 11 others were tried, either before the bench or a jury.

[277] Of the 12 cases in the sample that went to trial, five were entirely bench-tried, and seven were tried to a jury. Only one jury trial was won by a defendant, and that case was reversed on the ground that the jury instructions were

On appeal, twelve (50%) of the twenty-four appealed decisions were reversed in whole or in part. This would seem to be a high error rate, given the fact that the circuit reversed about 9.8% of all the civil cases appealed to it over the same time period from 1990 to 1996. Of the cases disposed of below on motion, a third were subsequently reversed in whole or in part on appeal.[278]

Because, as noted earlier, reversal rates alone do not tell a very complete story, the cases were further analyzed. One approach was to break the cases down to see whether, on the whole, the reversals favored defendants or plaintiffs - that is, to determine who was the more favored party in terms of the outcome of the appeal. In only two cases where reversals were granted in full or in part did the result entirely or largely favor defendants. In the other ten instances, the outcome substantially favored plaintiffs, either by reversing in favor of the defendant only on minor issues while leaving plaintiffs' victories below substantially intact, or by reversing defendants'

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inadequate. Of the five tried in their entirety to a judge, four were won by defendants; one case among the 12 was tried in part by a jury and in part by a judge and the plaintiff won both halves. The other "success" of a plaintiff in a proceeding before the judge was on damages, following a previous partial reversal of an earlier decision against her, and a remand. The judge then determined that her damage award for retaliatory discharge should be less than $5000; plaintiff appealed again, unsuccessfully. Of the jury trials won by plaintiffs, four were entirely or substantially affirmed by the Court of Appeals, and two reversed in whole or part.

[278] Seven of the 11 pro-defendant rulings were affirmed, and the rest reversed in whole or in part.

wins below outright or in major part.

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TABLE 26: Analysis of Reversals in Sexual Harassment Cases

Reversal in favor of defendant on all or most issues	2
Reversal in favor of defendant on some issues; plaintiff prevails on main issues	3
Reversal in favor of plaintiff on all or most issues	7
Reversal in favor of plaintiff on some issues - defendant prevails on main issues	0

The findings from two dozen cases obviously do not provide enough data from which to draw any firm conclusions one way or another about whether sexual harassment claims receive short shrift at the trial level. But these preliminary results do suggest reasons for concern, and provide cause for further study. In addition, even this small sample of cases offers some useful insights.

To begin with, a reading of the cases demonstrates at least one obvious reason that both plaintiffs and their counsel are likely to find these cases frustrating: in truth, under existing substantive federal law, even fairly egregious instances of sexual harassment are often simply beyond remedy.[279]

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[279] For example, at least two cases involved claims against union officials and were unsuccessful because the courts found that the Local's office rather than the union was the employer for purposes of Title VII and that the office did not meet the statutory 15 employee minimum. Kern v. City of Rochester, 93 F.3d 38 (2d Cir. 1996), cert. denied, 117 S. Ct. 1335; Yerdon v. Henry, 91 F.3d 370 (2d Cir. 1996). Difficulties in imputing knowledge to an employer is also a possible barrier to recovery in cases where the harassment is otherwise well-established. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59 (2d Cir. 1992).

Although this is a problem that cannot necessarily be cured by the courts, the distress of litigants and their attorneys ought not be worsened by an unsympathetic and dismissive attitude toward the legitimacy of their claim on the courts' time and attention.

Unfortunately, we found evidence in some cases that such attitudes sometimes do taint the proceedings, just as the anecdotal comments from focus groups, hearings and surveys indicated that they might. In a number of instances, a careful reading of the appellate opinions suggests that some trial judges exhibited impatience with these claims, as well as stereotyped thinking about the

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seriousness or the reality of the sexual harassment. In one instance, a district court judge expressed considerable skepticism that a sexually harassed woman who was not fired and who got promotions and pay raises during the period in which her supervisor demanded sexual favors, could nevertheless have suffered legally cognizable emotional injuries. In another case, the lower court's handling of it suggested a belief on the judge's part that the plaintiff's consumption of alcohol at a business dinner, rather than the egregious misconduct of her fellow employees, was the proximate cause of her rape. And in another case, the judge unexpectedly awarded summary judgment to the defendant on the merits - a ruling requested by neither side, and made despite the fact that neither plaintiff nor defendant had yet addressed in detail any issue in the litigation except for jurisdictional questions.

Thus, this brief look at reported decisions in appealed cases raises concerns that these cases are treated by trial judges with less than uniform seriousness and respect. And yet studies in recent years have shown over and over that sexual harassment is a fact of life for a significant part of the population of

working women. As noted by a recent New York State task force, and by the Ninth Circuit gender report, even among a sophisticated and powerful group of women - lawyers - up to two-thirds report that they have been the recipient of unwanted sexual advances from clients, colleagues or superiors in their professional life.[280]

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It is difficult to dismiss out of hand, therefore, the allegations we heard that judges sometimes engage in stereotyped thinking about these cases, or treat them as too "small potatoes" to be worth their energy and time. In response, it should be recalled that no external calculus establishes the extent of the rightful claim on judicial time that any class of case should make. The dollar value of the case or the importance on the national or world stage of the actors in the dispute obviously can influence a judge's evaluation of whether or not a case is "important." But whether a case is

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[280] The Governor's Task Force, Sexual Harassment: Building a Consensus for Change 33-34 (1993). The Governor's report cited a 1989 survey by the National Law Journal for its estimate that the problem was experienced by 60% of women lawyers. A study in Connecticut by the state bar also revealed a significant amount of sexual harassment experienced by lawyers. Committee on gender bias in the Profession, Connecticut Bar Association. Gender Issues in the Legal Profession, 69 Conn. B.J. 207 (1995). The Governor's report estimates that, overall, half of all working women experience harassment in their work lives. Governor's Task Force, supra, at 30. The Ninth Circuit study found that a third of lawyers reported having been sexually harassed. Ninth Circuit Report, supra note 271, at 829-30.

worth the time it takes is also a function of the values and life experiences that a judge brings to the case. One could argue plausibly that cases involving individual rights and protection against discrimination, even if small and affecting only a single individual, are more rather than less deserving of the attention of the federal bench, and more in need of its expertise, than a large commercial case which the parties, because they are major social actors, could probably get resolved fairly in a variety of fora. The point is simply that when a case is properly before a federal court, a judge's belief that it is too trivial for his or her attention can too easily transmute itself into actual unfairness to a litigant - in this instance, a result that disproportionately disadvantages both women and members of minority groups; this is a problem that deserves attention.